

2003

Death Penalty Prosecutorial Charging Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily Applied Based on County Funding?

Ashley Rupp

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Ashley Rupp, *Death Penalty Prosecutorial Charging Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily Applied Based on County Funding?*, 71 Fordham L. Rev. 2735 (2003).

Available at: <https://ir.lawnet.fordham.edu/flr/vol71/iss6/9>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

DEATH PENALTY PROSECUTORIAL CHARGING DECISIONS AND COUNTY BUDGETARY RESTRICTIONS: IS THE DEATH PENALTY ARBITRARILY APPLIED BASED ON COUNTY FUNDING?

Ashley Rupp*

INTRODUCTION

*There's not a lot of money there, but still we're a can-do county.*¹

Last summer, Gregory McKnight faced death penalty charges in front of Judge Simmons in the Vinton County, Ohio, courthouse.² Like many death penalty cases, the facts alleged against McKnight evidenced a heinous crime.³ McKnight stood accused of the murders of two local people whose remains were found in his home during an unrelated police search for stolen firearms.⁴ Typical of many small counties with limited death penalty experience, Vinton County had not adequately budgeted for the unexpected and enormous costs a death penalty trial posed.⁵ Typical of many defendants facing the death penalty, McKnight's due process rights were at risk because shortage of county funds meant that the county could not afford to provide him with an adequate defense.⁶ Atypical of any criminal

* J.D. Candidate, 2004, Fordham University School of Law. I am always grateful to my family and friends for their support, especially my parents, Michael and Lorraine Rupp, and my brother and sister-in-law, David and Susan Burgess, for giving me a lifetime of inspiration in my niece, Lillian. Thank you to Professor Deborah Denno for her suggestions and comments throughout this process. Finally, thank you to all those working so hard for so little to provide badly needed representation to indigent defendants accused of capital crimes.

1. Adam Liptak, *Citing Cost, Judge Rejects Death Penalty*, N.Y. Times, Aug. 18, 2002, at A18 (quoting Michael M. Bledsoe, Vinton County, Ohio Board of Commissioners President). The actual opinion in the case of *State v. McKnight* is currently unpublished.

2. *See id.* Vinton County, Ohio is the least populated county in Ohio, situated approximately two hours southeast from Columbus, Ohio.

3. *Id.*

4. *See* Michael Sangiacomo, *On the Wings of a Dove*, Plain Dealer (Cleveland), Jan. 19, 2003 (Sunday magazine) [hereinafter Sangiacomo, *Wings*].

5. *See* Liptak, *supra* note 1. For costs of the death penalty, see *infra* Part II.

6. *See* Liptak, *supra* note 1.

proceeding was the trial judge's recognition of this risk.⁷ In a shocking and unprecedented decision, Judge Simmons denied the prosecution's application to pursue the death penalty against McKnight. The judge decided that the county lacked the funding necessary to guarantee McKnight's right to due process under the Fourteenth Amendment.⁸ Because, as Judge Simmons acknowledged, "death is different,"⁹ and therefore subject to a higher degree of due process, a capital case would require more resources than a non-capital trial. Thus, a capital case would strain the county budget so far as to put McKnight's due process rights at risk.¹⁰

Like many states, Ohio requires two court-appointed defense lawyers in death penalty trials.¹¹ Further, Ohio's death penalty trials are bifurcated, consisting of a guilt phase and a penalty phase.¹² These procedural safeguards make it more costly to prosecute and defend a death penalty trial than a non-capital trial.¹³ Because Vinton County had an annual budget of only \$2.7 million and the estimated costs just to defend McKnight in his death penalty trial were \$350,000, Judge Simmons decided that the fiscal impact on the county would be too great to ensure an adequate defense.¹⁴ The Ohio Court of Appeals for Vinton County dismissed the prosecution's appeal, allowing Judge Simmons' ruling to stand.¹⁵

After much political and community pressure,¹⁶ however, Judge Simmons reversed himself and allowed the prosecution to pursue its death penalty case against McKnight.¹⁷ In reversing himself, Judge

7. *Id.*

8. *Id.*

9. *Id.*; see also *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). For a complete discussion of *Gregg* and due process requirements for death penalty cases, see *infra* Part II.

10. See Liptak, *supra* note 1.

11. *Id.*

12. Ohio Rev. Code Ann. § 2929.03(C)(2)(b), (D) (Anderson 2002) (requiring that the same triers of fact who found the defendant guilty of aggravated murder also find the aggravating factors beyond a reasonable doubt during the penalty phase); see, e.g., *Gregg*, 428 U.S. at 195 (stating that the concerns which caused the Court to outlaw existing death penalty statutes in *Furman* were best satisfied by a bifurcated trial). For a definition and explanation of bifurcated trials, see *infra* note 74.

13. See *infra* Part II.

14. See Liptak, *supra* note 1.

15. Frank Hinchey, *Judge Reverses No-Death Ruling*, Columbus Dispatch, Aug. 24, 2002, at A1 [hereinafter Hinchey, *Judge Reverses*].

16. See generally *Death Penalty Declined*, Columbus Dispatch, Aug. 15, 2002, at A14 (editorial arguing for a death sentence should McKnight be found guilty); *Due Process, Not the Due Bill*, Plain Dealer (Cleveland), Aug. 19, 2002, at B6; Frank Hinchey, *Vinton County Residents Say Cost Shouldn't Affect Trial*, Columbus Dispatch, Aug. 22, 2002, at C1; Stephanie Simon, *Town Weighs Price to Pay for Justice*, L.A. Times, Aug. 21, 2002, at A8; cf. Randy Ludlow, *Considering the Price of Justice*, Columbus Dispatch, Aug. 10, 2002, at C1 (citing victim Emily Murray's family's remorse and anger at Judge Simmons' ruling, but also citing Public Defenders' praise for Simmons' courage in protecting McKnight's due process rights).

17. See Hinchey, *Judge Reverses*, *supra* note 15 (stating that Judge Simmons

Simmons stated that his concerns regarding McKnight's denial of due process had been only hypothetical and not actual.¹⁸ Judge Simmons' hypothetical concerns, however, became a reality.

McKnight's double homicide trial took only two and a half weeks.¹⁹ The prosecution called thirty to forty witnesses while the defense called only one, whose testimony was easily impeached on cross-examination.²⁰ Judge Simmons offered more time and money to the defense for the penalty phase, but McKnight's court-appointed attorneys declined.²¹ Incongruously, during the pre-trial phase the defense was denied a \$4,250 telephone poll to determine if an unbiased jury could be found in the wake of intense publicity following Judge Simmons' controversial ruling.²² This concern was not unfounded. One local citizen, and thereby a member of the potential jury pool, stated she would "stand on the street corner and collect coins if she had to" in order to pay for McKnight's capital trial.²³ During deliberations, the jury heard a man drive by yelling "[h]ang that n---!"²⁴ Statements like these suggest that the unusually large amount of publicity and the egregious nature of the crime incensed the community. Thus, the defense's fear that an objective jury would be hard to come by in such a small town so personally affected by the trial does not seem unfounded.

The all-white jury deliberated only forty minutes in the penalty phase before recommending death for the twenty-four year-old McKnight.²⁵ On October 25, 2002, Judge Simmons sentenced Gregory B. McKnight to death despite pleas from victim Emily Murray's family that McKnight's life be spared.²⁶ His case is now on automatic appeal to the Ohio Court of Appeals.²⁷

reversed himself only nine minutes after the prosecution's appeal was dismissed).

18. *Ohio Town to Host Death Penalty Trial*, L.A. Times, Aug. 24, 2002, at A11. The actual opinion in the case of *State v. McKnight* is currently unpublished.

19. Michael Sangiacomo, *Court Bell Heralds Murder Conviction*, Plain Dealer (Cleveland), Oct. 11, 2002, at B1 [hereinafter Sangiacomo, *Court Bell*].

20. See Frank Hinchey, *Jurors Hear Final Witness in Slaying Case*, Columbus Dispatch, Oct. 9, 2002, at B1 (stating the prosecution's forty-plus witnesses were countered with only one witness for the defense); see also Frank Hinchey, *Murder Trial Now in Hands of Jurors*, Columbus Dispatch, Oct. 10, 2002, at C4 (citing the prosecution's summation of the testimony of forty-one witnesses and one hundred fifty exhibits submitted to prove McKnight's guilt). But see Sangiacomo, *Court Bell*, *supra* note 19 (stating the prosecution called only thirty witnesses).

21. See Frank Hinchey, *Death Penalty Urged for Killer*, Columbus Dispatch, Oct. 15, 2002, at A1 [hereinafter Hinchey, *Death Urged*].

22. See *Poll Denied in Murder Case*, Plain Dealer (Cleveland), Sept. 6, 2002, at B3.

23. See Sangiacomo, *Wings*, *supra* note 4 (internal quotations omitted).

24. *Id.*

25. See *id.*; see also Hinchey, *Death Urged*, *supra* note 21.

26. Frank Hinchey, *McKnight Gets Death Penalty*, Columbus Dispatch, Oct. 26, 2002, at A1 (quoting victim Emily Murray's sister's letter stating "I do not believe, and Emily did not believe, that one murder makes another just or right"); see also Michael Sangiacomo, *Don't Execute Daughter's Killer, Parents Plead*, Plain Dealer

The McKnight case is indicative of a pervasive problem in the criminal justice system that legal commentators have yet to fully address. Judge Simmons effectively pointed out the elephant in the courtroom. A careful consideration of the impact of budgets and county finances on prosecutorial charging decisions is long overdue. Legal scholars who have implied that budgetary restrictions may impact a prosecutor's decision to seek death generally have based their studies on the costs of the death penalty and the effect of those costs on communities.²⁸ None have fully analyzed the effect of costs on prosecutorial charging decisions in death penalty cases.²⁹

One of the reasons why legal scholars may have ignored the budgetary effect on prosecutorial charging decisions in death penalty cases is that courts have granted prosecutors virtually unchecked power to decide whom to charge and why, making the point seem moot.³⁰ Nevertheless, prosecutorial decisions based on something other than the strength of the case, community values, or proportionality of punishment, are arbitrary and capricious, and therefore violate the Eighth and Fourteenth Amendments of the Constitution.³¹ That arbitrary prosecutorial charging decisions are unconstitutional is especially apparent when viewed from the tried and true ideal that "death is different."³²

The death penalty cannot be arbitrarily applied.³³ States wishing to impose the death penalty must show a meaningful distinction between

(Cleveland), Oct. 16, 2002, at A1.

27. See Michael Sangiacomo, *Death Penalty for Killer of Ex-Shaker Woman Kenyon: Student's Parents Opposed Execution*, Plain Dealer (Cleveland), Oct. 26, 2002, at A1.

28. See James R. Acker, *When the Cheering Stopped: An Overview and Analysis of New York's Death Penalty Legislation*, 17 Pace L. Rev. 41, 178 (1996) (mentioning in passing that county budgets could have some effect on a prosecutor's decision but providing no real analysis); Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only "The Appearance of Justice"?*, 87 J. Crim. L. & Criminology 130, 273-74 (1996) (discussing proportionality review after *Gregg* and identifying per capita income as one of many possible factors in the number of death penalty prosecutions). But see Katherine Baicker, *The Budgetary Repercussions of Capital Convictions*, 8 n.1, available at <http://www.nber.org/papers/w8382> (Nat'l Bureau of Econ. Research, Working Paper No. 8382, 2001) (stating the unlikelihood that geographical disparities in prosecutorial charging decisions are due to budgets).

29. See Acker, *supra* note 28, at 178; Bienen, *supra* note 28, at 273-74.

30. See *McCleskey v. Kemp*, 481 U.S. 279, 296-97 (1987). "[T]he policy considerations behind a prosecutor's traditionally 'wide discretion' suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, 'often years after they were made.'" *Id.* at 296 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 425-26 (1976)); see also *infra* Part III (arguing that, while the Supreme Court has thus far refused to apply its arbitrary application analysis to prosecutorial charging decisions, such decisions should not be immune from review).

31. See *infra* Part III.

32. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). Supreme Court jurisprudence has created a "super due process" for capital cases. See *infra* Part I.

33. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

those who receive death and those who do not.³⁴ An example of arbitrary application of the death penalty would be if an impoverished county does not pursue a capital case because of budgetary restrictions where another county with more money would pursue death. As the Ohio prosecutor stated in McKnight's case, there cannot be two systems of justice in the same state: one for affluent counties and another for impoverished counties.³⁵

A difficulty immediately presents itself as there are problems with extending arbitrary application analysis to pre-trial phases. The Supreme Court has declined to find arbitrary application of the death penalty where prosecutorial discretion is involved, absent proof of specific intent.³⁶ However, a constitutional criterion requiring non-arbitrary application of the death penalty should not start and stop at the sentencing phase. There are many factors which affect prosecutorial charging decisions; the allocation of county funds should not be a factor when deciding whether a defendant will be subject to the death penalty.

This Note explores the effect of county budgets on prosecutorial charging decisions and arbitrary application of the death penalty in murder cases. This Note seeks to elucidate the constitutional problems that arise when prosecutors take budgetary considerations into account in capital charging decisions.

Part I provides a background of Supreme Court death penalty jurisprudence with an eye toward examining what the Supreme Court has deemed arbitrary applications of the death penalty. Part I.A describes the watershed case of modern Supreme Court death penalty jurisprudence, *Furman v. Georgia*.³⁷ *Furman* was the first Supreme Court case to declare the death penalty unconstitutional as applied. Here, the Court laid the template to which all future death penalty statutes must conform in order to avoid unconstitutional arbitrary application of law.

Part I.B examines the next highly influential Supreme Court case, *Gregg v. Georgia*.³⁸ *Gregg* upheld a new breed of death penalty statutes that conformed to the requirements of *Furman*. Part I.B also examines subsequent Supreme Court cases validating state death penalty statutes that sufficiently protected against arbitrary application. Finally, Part I.C details cases in which the Court struck down death penalty statutes that insufficiently guarded against arbitrary application.³⁹

34. *Gregg*, 428 U.S. at 189.

35. Simon, *supra* note 16 (quoting Vinton County prosecutor Timothy Gleeson).

36. *McCleskey v. Kemp*, 481 U.S. 279, 293-98 (1987).

37. 408 U.S. 238 (1972); *see also infra* Part I.A.

38. 428 U.S. 153 (1976); *see also infra* Part I.B.

39. *See infra* Part I.C.

Part II.A examines the costs of the death penalty both nationally and in select states, including California and New York. Part II.B discusses the economic effect of such costs on localities. Part II.C provides a simple but unprecedented analysis comparing two California counties, Ventura and Riverside, with similar homicide clearance rates, but very different criminal justice budgets. The analysis and accompanying data table illustrate that budgets affect prosecutorial charging decisions in death penalty cases.

Part III explains the importance of these cost statistics to county prosecutors and how they bear on prosecutorial charging decisions. This Part also argues that county budgetary considerations are not within the broad power of prosecutorial discretion and constitute arbitrary application of law under Supreme Court death penalty jurisprudence. Finally Part III argues that the death penalty is unconstitutional as applied because states cannot afford to comply with the strict standards of United States death penalty jurisprudence. In the alternative, even if the death penalty remains constitutionally permissible, courts must address the problem of arbitrary application earlier than the sentencing phase.

I. SUPREME COURT DEATH PENALTY JURISPRUDENCE DICTATES THAT THE DEATH PENALTY CANNOT BE ARBITRARILY APPLIED

The Supreme Court has reviewed many different versions of state death penalty statutes. Consistent throughout these cases is the constitutional requirement that the death penalty not be arbitrarily applied. If a death penalty statute does not provide meaningful distinctions between capital and non-capital crimes, then the statute runs the risk of arbitrary application and is unconstitutional, violating the Eighth Amendment. This Part discusses important modern Supreme Court death penalty cases and examines how the Court reviewed statutes to ensure they sufficiently protected against arbitrary application.

A. *The Fall of Capital Punishment Under Furman v. Georgia*

In 1972, the Supreme Court decided the landmark case of *Furman v. Georgia*.⁴⁰ There, the Court reviewed the Georgia and Texas death penalty statutes to determine if they constituted cruel and unusual punishment under the Eighth Amendment.⁴¹ The statutes enumerated many capital crimes but provided no further guidance to the sentencing authority in deciding whether to impose the death penalty. In a per curiam opinion, the Court held that the statutes

40. 408 U.S. at 238.

41. *Id.* at 239; *see also* U.S. Const. amend. VIII.

allowing full discretion to the judge and jury to determine whether to apply the death penalty were unconstitutional.⁴²

All three defendants in *Furman* were African-American men; two were sentenced to death for rape, one for murder.⁴³ The first defendant, Jackson, an escaped convict, was convicted and sentenced to death for raping a white woman during a botched robbery attempt when he was twenty-one years old.⁴⁴ The second defendant, Furman, was a twenty-six year-old with a sixth-grade education when he was convicted of murder and sentenced to death.⁴⁵ He shot a homeowner behind a closed door who had discovered Furman's illegal entry.⁴⁶ Furman claimed he had tripped, causing the gun to fire.⁴⁷ He was committed to a psychiatric hospital pending trial and a unanimous staff deemed him incompetent to stand trial.⁴⁸ Just before trial, however, despite an unchanged diagnosis, the superintendent of the hospital went against the unanimous staff diagnosis and concluded that Furman could be tried, stating that Furman was "not psychotic at present, [knew] right from wrong and [was] able to cooperate with his counsel in preparing his defense."⁴⁹ Thanks to Furman's sudden onset of sanity, he was allowed to stand trial. The third defendant, Branch, was convicted and sentenced to death for raping an elderly white woman in her home and demanding money.⁵⁰ In a previous conviction for theft, Branch was found to be borderline mentally retarded with an I.Q. well below that of the average inmate in Texas.⁵¹

The Supreme Court granted certiorari to answer the question, "[d]oes the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"⁵² In determining that the Texas and Georgia statutes constituted cruel and unusual punishment, Justice Douglas's concurring opinion ran through a litany of historical facts evidencing that the framers intended the cruel and unusual clause of the Eighth Amendment to prevent arbitrary application of harsh penalties.⁵³ Douglas stated that the constitutional

42. *Furman*, 408 U.S. at 240. Justices Brennan and Marshall stated the death penalty was unconstitutional per se. Justices Douglas, Stewart, and White found the death penalty was unconstitutional as applied in these statutes. Chief Justice Burger, and Justices Blackmun, Powell, and Rehnquist dissented. For a summary of their dissenting opinions, see *infra* note 69.

43. *Id.* at 252-53.

44. *Id.* at 252.

45. *Id.*

46. See Daniel Gilvelber, *The New Law of Murder*, 69 Ind. L.J. 375, 403-04 (1994).

47. See *id.* at 404.

48. *Furman*, 408 U.S. at 252-53.

49. *Id.* at 253 (emphasis added) (internal quotations omitted).

50. *Id.*

51. *Id.*

52. *Id.* at 239.

53. *Id.* at 242-44. "There is evidence that . . . the English Bill of Rights of 1689,

"unusualness" of a penalty determined whether the penalty constitutes arbitrary application.⁵⁴ He equated the meaning of "cruel and unusual" with a mandate to legislatures and judges to ensure non-arbitrary application of criminal sanctions.⁵⁵ Douglas, as did most of the concurring Justices, denounced arbitrary application of the death penalty in terms of racial disparity.⁵⁶ However, the Justices' opinions should not be confined to oppose only arbitrary application based on race.⁵⁷ The arbitrary application found in *Furman* was a result of the excessive discretion allowed the fact-finder: "Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12."⁵⁸ This statement shows that, while jurors and prosecutors are allowed judgment calls, the Constitution requires that those judgments be guided by statute and law sufficiently to guard against arbitrary application.

Justice Douglas was not alone in his denouncement of arbitrary application of the death penalty. Justice Brennan also determined that the primary purpose of the cruel and unusual punishment clause was to deter arbitrary application of penal laws.⁵⁹ Brennan proposed a four-part test for concluding that a punishment is cruel and unusual. The second part of the test stated that if a punishment is likely to be inflicted arbitrarily, then it may be unconstitutional.⁶⁰ In fact,

from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid *arbitrary* and discriminatory penalties of a severe nature." *Id.* at 242 (emphasis added).

54. *Id.* at 249. "'A penalty . . . should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily.'" *Id.* at 249 (quoting Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 Harv. L. Rev. 1773, 1790 (1970)). *But see id.* at 376-79 (Burger, C.J., dissenting) (citing the lack of historical or precedential importance placed on the "unusual" clause of the Eighth Amendment and, therefore, stating that the clause should not be used to declare the death penalty unconstitutional).

55. *Id.* at 256. "The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily . . ." *Id.*

56. *See id.* at 250 n.15 ("something more than chance has operated over the years to produce this racial difference") (citing a Pennsylvania study of death row inmates); *see id.* at 364 (Marshall, J., concurring). *But see id.* at 310 (Stewart, J., concurring) ("But racial discrimination has not been proved, and I put it to one side." (footnote omitted)).

57. *See infra* Part III (arguing that the Court's arbitrary application analysis should not be confined to post-sentence review).

58. *Furman*, 408 U.S. at 253 (Douglas, J., concurring).

59. *Id.* at 277 (Brennan, J., concurring) ("The more significant function of the Clause, therefore, is to protect against the danger of . . . arbitrary infliction [of extremely severe punishments].").

60. *Id.* at 282 (Brennan, J., concurring).

The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, *if there is a strong probability that it is inflicted arbitrarily*, if it is substantially rejected by contemporary society, and if there is no reason

Brennan claimed that arbitrary application of the death penalty "smacks of little more than a lottery system."⁶¹ This is a troubling statement to be associated with our criminal justice system.

The three remaining concurring opinions also derided the arbitrary application of the death penalty.⁶² In each of their opinions, Justices Stewart, White and Marshall stated that they would not tolerate statutes allowing for arbitrary application of the death penalty. Justice Stewart, while he did not find the death penalty unconstitutional *per se*, also would not tolerate its arbitrary application.⁶³ In his concurring opinion, Stewart stated that the Constitution would not "tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."⁶⁴ Justice White found that "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not," thus indicating impermissibly arbitrary application.⁶⁵ Finally, Justice Marshall examined the history of capital punishment and found the death penalty to be excessive and morally unacceptable.⁶⁶ Marshall colorfully illustrated his findings by stating that the death penalty creates "society's sacrificial lamb."⁶⁷ He stated that capital punishment is imposed discriminatorily against "the poor, the illiterate, the underprivileged," and minorities.⁶⁸ The Justices reasoned that discriminatory factors do not result in a reasoned application of law but rather an arbitrary application.

Thus, all five Justices, while not agreeing that the death penalty is unconstitutional *per se*, did agree that if arbitrarily applied, capital punishment violated the Eighth Amendment.⁶⁹ Because they did not

to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause

Id. (Brennan, J., concurring) (emphasis added).

61. *Id.* at 293 (Brennan, J., concurring).

62. *See generally id.* at 306-74.

63. *Id.* at 310 (Stewart, J., concurring).

64. *Id.* (Stewart, J., concurring).

65. *Id.* at 313 (White, J., concurring).

66. *See generally id.* at 314-74 (Marshall, J., concurring).

67. *Id.* at 364 (Marshall, J., concurring).

68. *Id.* (Marshall, J., concurring).

69. The dissenting opinions in this case are also of academic interest. Chief Justice Burger primarily dissented because the Court was overstepping its constitutional bounds: "[i]f we were possessed of legislative power, I would either join with Mr. Justice Brennan and Mr. Justice Marshall [striking the death penalty as unconstitutional *per se*] or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes." *Id.* at 375 (Burger, J., dissenting). Burger also stated that even if the Court were needed in the instant case because the legislature had abdicated its role as the monitor of social morality, there was nothing to indicate that the social mores had swung to the side of abdicating the death penalty. *See id.* at 385-86.

Justice Blackmun began his dissent by passionately stating his utter moral

agree to strike down the death penalty as unconstitutional per se, the door was left open for states to attempt to enact statutes that protect against arbitrary application.⁷⁰ Four years after *Furman*, this new breed of state death penalty statute was put to the test. In *Gregg v. Georgia*, discussed below, the Supreme Court granted its approval to the first wave of these statutes.⁷¹

B. The Return of Capital Punishment: Gregg and Cases Upholding State Death Penalty Statutes Because They Did Not Result in Arbitrary Application of Law

At least one member of *Furman* Court believed that he had ended the death penalty debate.⁷² Instead, it seemed *Furman* had only laid down a template to which future death penalty statutes must conform. In 1976, four years after *Furman*, the Court reviewed a revamped Georgia capital punishment statute in *Gregg*.⁷³ The new statute instituted bifurcated trials,⁷⁴ required a finding of statutory

abhorrence for capital punishment. *See id.* at 405-06 (Blackmun, J., dissenting). Blackmun, however, disagreed with the Court's contention that abolition of capital punishment reflected changing social mores because the Court had affirmed death penalty convictions not long ago. *Id.* at 410 (Blackmun, J., dissenting). The "suddenness" of the Court's determination that society would no longer tolerate capital punishment primarily concerned Blackmun. *Id.* (Blackmun, J., dissenting).

Justice Powell simply ran through the litany of prior Supreme Court death penalty decisions and concluded that *Furman* fell far afield of these past cases. *See generally id.* at 414-65 (Powell, J., dissenting). Powell further claimed that both stare decisis and separation of powers dictated that the Court not strike the death penalty statutes as unconstitutional. *See id.* at 431-33 (Powell, J., dissenting).

Justice Rehnquist wrote a short dissenting opinion calling for judicial self-restraint and deference to the elected legislature. *See id.* at 465-70 (Rehnquist, J., dissenting).

70. *See id.* at 396-405 (Burger, C.J., dissenting) (stating that the death penalty has not been deemed unconstitutional per se and laying out a roadmap for future legislative attempts at applying the death penalty which would meet the constitutional requirements of *Furman*); *see also id.* at 415 (Powell, J., dissenting) (pointing out that only two of the five concurring opinions pronounced the death penalty unconstitutional per se).

71. *Gregg v. Georgia*, 428 U.S. 153 (1976).

72. *See id.* at 231-32 (Marshall, J., dissenting). Justice Marshall's dissent in *Gregg* stated that his opinion in *Furman* reflected his belief that Americans had progressed morally beyond accepting capital punishment. Marshall said he still believed that if Americans were informed about capital punishment they would not tolerate it. *See id.* at 232-33.

73. *Id.* at 162-68.

74. Bifurcated trials require the normal guilt phase plus an added sentencing phase. Usually the same jury that decided the guilt phase will go on to decide whether the death penalty will be imposed. *See, e.g.,* Ohio Rev. Code Ann. § 2929.03(C)(2)(b)(ii) (Anderson 2003). Often the penalty phase of a trial is longer and more involved than the guilt phase with defense attorneys presenting a myriad of mitigating evidence and prosecutors presenting victim impact statements. Like the guilt phase, the jury must unanimously decide for or against the sentence of death.

Separating the trial into two phases like this is thought to provide more due process protection to the defendant as he is generally allowed broad discretion in

aggravators,⁷⁵ and required immediate appellate review for all capital cases.⁷⁶ Gregg, the defendant in this case, was tried under this new statute.⁷⁷ He and a friend were picked up by two men while hitchhiking in Florida. Gregg admitted shooting the men, then robbing them and stealing their car, but he claimed it was self-defense because the two men had attacked him with a pipe and a knife.⁷⁸ The jury found Gregg guilty of two counts of murder and two counts of armed robbery.⁷⁹ In the penalty phase of the trial, the jury found beyond a reasonable doubt that two statutory aggravators were present: the murders were committed while in the commission of the two armed robbery felonies, and Gregg committed the murders for pecuniary gain.⁸⁰ Due to the presence of these statutory aggravating factors, the jury could consider, and did in fact impose, the death penalty.⁸¹ The jury voted to impose the death penalty for the armed robbery counts as well, but on review, the Supreme Court of Georgia vacated that sentence because of the rarity of death sentences for armed robbery.⁸² The two death sentences for the murders, however, withstood the automatic appeal.⁸³

On appeal to the U.S. Supreme Court, the defendant argued that the Georgia death penalty statute constituted cruel and unusual punishment per the Court's decision in *Furman*.⁸⁴ The Court found that the new statutory safeguards reviewed in *Gregg* sufficiently protected against arbitrary application of the death penalty.⁸⁵ The Court determined that the direct appellate review was successful in identifying any intimations of arbitrary application of the death

presenting mitigating evidence and has his fate decided by twelve jurors rather than one judge. *E.g., id.* § 2929.03 (D)(1) (requiring the defendant have the burden of going forward with his or her mitigating evidence). However, in some states, the prosecution is also allowed more discretion and can offer evidence in the penalty phase which was excluded during the guilt phase. *Id.* (identifying evidence the prosecutor may present to support a finding of aggravating factors).

75. Statutory aggravators are enumerated circumstances of the crime that, if the finder of fact determines are present, make the defendant death-eligible. Many standard statutory aggravators cover circumstances like cop-killing, in-prison murder, murder in the course or in furtherance of an enumerated felony, murder for hire, or murder as part of a terrorist plot. *See, e.g.,* Cal. Penal Code § 190.2 (West 2002); N.Y. Penal Law § 125.27 (McKinney 2002).

76. *See Gregg*, 428 U.S. at 166-68.

77. *Id.* at 158, 162.

78. *Id.* at 159-60.

79. *Id.* at 160.

80. *Id.* at 161.

81. *Id.*

82. *Id.* at 161-62.

83. *Id.* at 161.

84. *See id.* at 162.

85. *See id.* at 190-95. "Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner." *Id.* at 195.

penalty.⁸⁶ The statute required the trial judge to submit a report to the appellate court to ensure that no arbitrary application occurred.⁸⁷ This report questioned "the quality of the defendant's representation, whether race played a role in the trial, and, whether . . . there was any doubt about the defendant's guilt or the appropriateness of the sentence."⁸⁸ Here, the Georgia Supreme Court held that the conviction and death sentence was not a result of arbitrary factors.⁸⁹ The U.S. Supreme Court found that Georgia's mandatory appellate review process adequately protected against arbitrary application of the death penalty, especially in light of the vacated armed robbery death sentences.⁹⁰

The majority opinion demonstrates that the *Gregg* Court remained concerned with arbitrary application of the death penalty. The following cases decided after *Gregg*, demonstrate the Court's continuing concerns regarding arbitrary application, though most of these cases have ultimately affirmed the state capital punishment statutes at issue. In two cases decided the same day as *Gregg*, the Court upheld the Texas and Florida death penalty statutes on the basis that they would not result in arbitrary application of death sentences.⁹¹ Both statutes were substantially similar to the Georgia statute in that they employed the same statutory due process safeguards like bifurcated trials, statutory aggravators, and appellate review.⁹²

In the first case, *Jurek v. Texas*, the Court upheld the Texas capital punishment statute stating: "Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law. Because this system serves to assure that

86. *Id.* at 166-67 (citing the Georgia statute requiring appellate review to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor").

87. *Id.* at 167.

88. *Id.* at 167-68.

89. *Id.* at 161.

90. *Id.* at 205-07. *But see id.* at 227-31 (Brennan, J., dissenting). Justice Brennan maintained his conviction that the death penalty offended the letter and spirit of the Eighth Amendment because the Amendment requires that states not degrade the dignity of their citizens. Brennan again claimed that the death penalty denied this basic dignity and, as that offends the Eighth Amendment, the Court was required to find it unconstitutional. *Id.* at 229-30.

Unsurprisingly, Justice Marshall also dissented from *Gregg*. *See generally id.* at 231-41 (Marshall, J., dissenting). Marshall first claimed that if citizens were more informed about the death penalty they would not have supported the many new capital punishment statutes following *Furman*. *Id.* at 232 (Marshall, J., dissenting). Further, Marshall stated that even if social mores had not evolved as he hoped in *Furman*, the death penalty was still an excessive and unnecessary punishment. *Id.* at 232-33 (Marshall, J., dissenting).

91. *See Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

92. *See Jurek*, 428 U.S. at 267-68; *Proffitt*, 428 U.S. at 247-51.

sentences of death will not be 'wantonly' or 'freakishly' imposed, it does not violate the Constitution."⁹³ Thus, the Texas statute satisfied the *Furman* template and, in the Court's view, sufficiently protected against arbitrary application of the death penalty.⁹⁴

In the second case, *Proffitt v. Florida*, the Court similarly upheld a Florida death penalty statute, stating: "The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner."⁹⁵ The Florida and Texas statutes passed constitutional muster because, according to the Court, they adequately protected against arbitrary application and did not fall victim to the same inadequacies as the Georgia statute at issue in *Furman*.

In a similar analysis, the Court maintained its concern with arbitrary application while allowing states to experiment with death penalty statutes, so long as the statutes sufficiently guarded against arbitrary application. In *Pulley v. Harris*,⁹⁶ the Court upheld a California death penalty statute as sufficiently protecting against arbitrary application despite its lack of what was previously thought to be a necessary constitutional safeguard—mandatory appellate proportionality review.⁹⁷ Defendant Harris was convicted of a double homicide; Harris and an accomplice stole a getaway car and took its two occupants hostage.⁹⁸ When one of the victims attempted to flee, Harris shot the remaining man, then pursued and fatally wounded the fleeing man.⁹⁹

Harris was sentenced to death and appealed to the Supreme Court, claiming that the California statute was unconstitutional because it did not require appellate proportionality review to safeguard against arbitrary application of the death penalty.¹⁰⁰ In finding that proportionality review was one way to safeguard against arbitrary application, the Court nonetheless held it was not the only way to do so.¹⁰¹ Because the California statute limited the discretion of the sentencing authority by providing for a finding of statutory

93. *Jurek*, 428 U.S. at 276.

94. *See id.*

95. 428 U.S. at 252-53.

96. 465 U.S. 37 (1983).

97. *See id.* at 42-44. Proportionality review is the term for an appellate review practice to ensure that the punishment fits the crime and that similarly situated defendants are receiving similar punishments. *Id.*

98. *Id.* at 38 n.1.

99. *Id.*

100. *Id.* at 39-40.

101. *Id.* at 50. "Proportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required." *Id.* at 50 (referring to previous Supreme Court death penalty cases including *Gregg* and *Jurek*).

aggravators, the Court found that the statute was constitutionally permissible.¹⁰²

Finally, in one of the Court's more controversial rulings concerning capital punishment, *McCleskey v. Kemp*, the Court upheld defendant McCleskey's death sentence despite an apparent racial disparity in the Georgia capital sentencing scheme.¹⁰³ McCleskey was an African-American man convicted of killing a white police officer while McCleskey and three others were robbing a furniture store.¹⁰⁴ McCleskey was the only one of the four robbers inside the store when the police officer was fatally wounded.¹⁰⁵ At the penalty phase of McCleskey's trial, the jury found beyond a reasonable doubt that two aggravating circumstances existed: McCleskey committed the murder while participating in armed robbery, and McCleskey had killed an on-duty police officer responding to the store's silent alarm.¹⁰⁶ McCleskey's defense counsel offered no mitigating evidence and McCleskey was sentenced to death following the jury recommendation.¹⁰⁷

On appeal, the defendant's argument that Georgia prosecutors applied the death penalty discriminatorily was based on David Baldus's complex study suggesting racial disparities in prosecutorial charging decisions in Georgia.¹⁰⁸ The Supreme Court found that the racial disparity was not enough to support a finding that Georgia's death penalty statute was arbitrarily applied.¹⁰⁹ The Court stated that, despite Professor Baldus's complex study, the Georgia statute sufficiently guarded against arbitrary application.¹¹⁰ The Court based its analysis mainly on the Equal Protection Clause of the Fourteenth Amendment.¹¹¹ However, the *McCleskey* Court did briefly analyze McCleskey's Eighth Amendment arbitrary application claim.¹¹² The Court found that, because the Baldus study proved only racial disparity but not racial discrimination, the study did not show arbitrary application of the death penalty.¹¹³ The Court refused to find an unconstitutional risk of racial discrimination based on the study.¹¹⁴

102. *See id.* at 51-54.

103. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

104. *Id.* at 283.

105. *Id.*

106. *Id.* at 284-85.

107. *Id.* at 285.

108. *Id.* at 286-91.

109. *Id.* at 297.

110. *See id.* at 312-13.

111. *See infra* notes 318-21 and accompanying text.

112. *See McCleskey*, 481 U.S. at 301-13.

113. *Id.* at 308-09.

114. *Id.* at 309.

C. Contemporary Supreme Court Cases in Which the Court Has Struck Down State Statutes That Led to Arbitrary Application of Law

The Court has, in some instances, struck down state capital punishment statutes because they insufficiently guarded against arbitrary application of the death penalty. In *Godfrey v. Georgia*, the Court overturned a death sentence based on a statutory aggravator that allowed the jury to find that the murder was “outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.”¹¹⁵ The defendant in *Godfrey* had been convicted of killing his estranged wife and mother-in-law after a prolonged domestic dispute.¹¹⁶ His wife had left him weeks before and refused reconciliation.¹¹⁷ Convinced that his mother-in-law was behind his wife’s refusal, Godfrey went to his mother-in-law’s house and committed what he told the responding officers was “a hideous crime.”¹¹⁸ At trial, the prosecutor told the jury that no charge of torture or aggravated battery was before them, therefore the jury found for death based on “depravity of mind,” evidenced by an “outrageously or wantonly vile, horrible and inhuman” murder.¹¹⁹

The Court found the phrase above to be unconstitutionally vague because the words did not imply “any inherent restraint on the arbitrary and capricious infliction of the death sentence.”¹²⁰ Because this phrase was considered vague and the Georgia Supreme Court had not narrowed its application in this case, the Court vacated the death sentence.¹²¹ The United States Supreme Court reiterated the underlying reasoning of *Furman* and *Gregg*—that a state authorizing capital punishment must do so in a way that protects against arbitrary application.¹²²

In striking down a similar statute, the Court, in *Maynard v. Cartwright*, declared that Oklahoma’s statutory aggravator referring to “especially heinous, atrocious, or cruel” murders was unconstitutionally vague and insufficiently protected against arbitrary application.¹²³ Defendant Cartwright was a disgruntled ex-employee of the victim.¹²⁴ Cartwright entered the home of Mr. and Mrs. Riddle,

115. *Gregg v. Georgia*, 446 U.S. 420, 422 (1980) (citation omitted).

116. *Id.* at 424-25.

117. *Id.*

118. *Id.* at 425-26.

119. *See id.* at 426.

120. *Id.* at 428.

121. *Id.* at 433. “There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.” *Id.*

122. *Id.* at 428. “[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.” *Id.*

123. *Maynard v. Cartwright*, 486 U.S. 356, 363-64 (1988).

124. *Id.* at 358.

fatally shooting his former employer.¹²⁵ Mrs. Riddle survived two gunshot wounds, two stab wounds, and a slit throat to call the police.¹²⁶ The Supreme Court affirmed the Tenth Circuit's ruling that the words of the statute did not comply with the *Furman* template for avoiding arbitrary application.¹²⁷ Because the statute did not sufficiently channel the discretion of the sentencing authority and the Oklahoma Supreme Court did not narrowly construe the facially vague statute, the *Maynard* Court found the statute unconstitutional.¹²⁸

Though the Court has been intensely concerned with arbitrary application in death penalty cases, the Court has not allowed states to subvert other constitutional due process requirements in order to combat arbitrary application. Instead, in *Ring v. Arizona*, the Court required that the state not infringe on a defendant's Sixth Amendment rights while combating arbitrary application.¹²⁹ In *Ring*, the Court struck down an Arizona statute allowing the trial judge to act as a fact-finder determining the existence of statutory aggravators.¹³⁰ Absent a finding of at least one of these statutory aggravators, the defendant would not be eligible for death.¹³¹ The statute required that the judge determine whether any statutory aggravators existed making the defendant death-eligible.¹³²

Defendant Ring was found guilty of felony murder resulting from an armored car heist, during which the armored car driver was fatally shot.¹³³ Police wiretaps revealed that Ring knew of the heist but did not show beyond a reasonable doubt that Ring murdered the driver, planned the robbery, or even that he participated or was present at the scene.¹³⁴ Thus, the government could not make a case for participatory murder.¹³⁵ The wiretaps and the money police found at Ring's apartment, however, were enough to secure a felony murder conviction.¹³⁶

As per the Arizona statute, Ring would not be eligible for the death penalty for felony murder unless additional findings were made.¹³⁷ The Arizona statute required the trial judge to hold a sentencing hearing to determine if the defendant would be eligible for death.¹³⁸

125. *Id.*

126. *Id.*

127. *Id.* at 359-60.

128. *Id.* at 363-64.

129. *Ring v. Arizona*, 122 S. Ct. 2428, 2443 (2002).

130. *Id.*

131. *Id.* at 2434-35.

132. *Id.*

133. *Id.* at 2432-33.

134. *Id.* at 2434.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

Under the statute, the judge was the sole determiner of whether facts existed justifying the imposition of the death penalty.¹³⁹ In order to impose the death penalty, the judge must find that at least one aggravating circumstance is present and that there are no sufficiently substantial mitigating factors for leniency.¹⁴⁰

The *Ring* Court found that Arizona's statute violated the defendant's right to a jury trial because the statutory aggravators were not found beyond a reasonable doubt by a jury of his peers.¹⁴¹ Thus, the Court actually justified its decision based on Sixth Amendment jurisprudence.¹⁴² The Court rejected the government's argument that states should be given more latitude under the Fifth and Sixth Amendments because the Eighth Amendment limitations against arbitrary application created in *Furman* were so strict.¹⁴³ Arizona also argued that judicial determinations of statutory aggravators would actually avoid arbitrary application, thus serving the Court's Eighth Amendment jurisprudence requiring "super due process."¹⁴⁴ Instead of subverting the Sixth Amendment to compensate for the restrictions of the Eighth Amendment in death penalty cases, the Court stated that the government would have to find another way to combat potential arbitrary application of death sentences.¹⁴⁵

Justice Breyer's concurring opinion, however, did use the Eighth Amendment to justify striking down the Arizona statute.¹⁴⁶ He found that jury determination of statutory aggravators was the only permissible way to combat potential arbitrary application.¹⁴⁷ Thus, though Supreme Court death penalty jurisprudence restricts states' ability to create statutes, the Court will not subvert defendants' other

139. *Id.*

140. *Id.* at 2434-35.

141. *See id.* at 2443.

142. *See id.*

143. *Id.* at 2442.

The notion 'that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence.'

Id. (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 539 (2000) (O'Connor, J., dissenting)).

144. *Id.* at 2442.

145. *Id.* "Arizona suggests that judicial authority over the finding of aggravating factors 'may . . . be a better way to guarantee against the arbitrary imposition of the death penalty.' The Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential fact-finders." *Id.* (citation omitted).

146. *Id.* at 2446 (Breyer, J., concurring).

147. *See id.* at 2447-48 (Breyer, J., concurring). "For these reasons, the danger of unwarranted imposition of the penalty cannot be avoided unless 'the decision to impose the death penalty is made by a jury rather than by a single governmental official.'" *Id.* at 2448 (Breyer, J., concurring) (quoting *Spaziano v. Florida*, 468 U.S. 447, 469 (1984) (Stevens, J., concurring in part and dissenting in part)).

constitutional rights to compensate for Eighth Amendment restrictions.

The cases discussed above show that the Supreme Court has remained vigilant in attempting to ensure that the death penalty not be arbitrarily applied. However, as seen in *McCleskey v. Kemp*, the Court ignored evidence showing risks, or in fact probabilities, that prosecutors arbitrarily applied Georgia's death penalty statute based on the color of the victim's skin.¹⁴⁸ In fact, the Court has only applied the Eighth Amendment arbitrary application analysis post-trial, never to pre-trial prosecutorial charging decisions.¹⁴⁹ Why the Court has chosen to limit arbitrary application analysis to post-trial decisions is unclear. It is clear, however, that the Supreme Court's death penalty jurisprudence is convoluted and extremely confusing. This confusion has led to death penalty trials costing exorbitant amounts of money because of the strict rules of the Court. Counties and local prosecutors often balk when faced with such costs.¹⁵⁰

II. THE HIGH COSTS OF DEATH PENALTY TRIALS AND GEOGRAPHICAL DISPARITIES IN PROSECUTORIAL CHARGING DECISIONS

This part demonstrates that capital punishment costs have reached incredible heights in this country, and that fear of incurring such costs may improperly affect a prosecutor's charging decision. Part II.A illustrates the exorbitant costs of implementing capital punishment both on a national level and in a few key states, California, New York, Florida, and Texas. By examining several anecdotal accounts, Part II.B shows the impact of these costs on local governments and county services. Part II.C presents a study of Maryland, Nebraska, New York, and presents original research and analysis of California, all of which demonstrate a correlation between county budget allocations and prosecutorial charging decisions in death-eligible homicides.

A. *Actual Costs To Try a Death Penalty Case: National Statistics*

The costs of death penalty trials are staggering. The statistics below reflect the incredible amounts of money that states spend on implementing the death penalty every year. California's death penalty budget is examined specifically to provide context to the simple comparative analysis of two California counties presented in Part II.C. The New York statistics demonstrate that the implementation of the death penalty is extremely expensive as New York reinstated the death penalty in 1995. Finally, Florida and Texas

148. See generally *McCleskey v. Kemp*, 481 U.S. 279 (1987).

149. *Id.*

150. See generally *infra* Part II (discussing the costs of the death penalty and the effect of those costs on local governments).

are discussed briefly to provide a national context for the California and New York data. Another reason for including Florida and Texas is that both states prosecute a large number of death penalty cases.

1. Costs of Capital Cases Generally

Death penalty cases cost counties exorbitant amounts of money, and they certainly cost much more than non-death penalty murder cases.¹⁵¹ Richard Dieter of the Death Penalty Information Center estimates that the states and the federal government have spent an extra \$500 million nationally on the death penalty since its reenactment in 1976.¹⁵² Dieter based this figure on a Duke University study of North Carolina's capital cases since 1976.¹⁵³ The Duke study found that North Carolina capital cases are at least \$2.16 million dollars more expensive per case than non-capital murder cases where the defendant was sentenced to life.¹⁵⁴

Some critics of the high cost of the death penalty mistakenly assume that the cost is associated with the appeals process.¹⁵⁵ Not so.¹⁵⁶ Because the Supreme Court has decided "death is different,"¹⁵⁷ many additional due process safeguards are in place at the trial level.¹⁵⁸ This super due process accounts for much of the added costs of the death

151. See generally Justin Brooks & Jeanne Huey Erickson, *The Dire Wolf Collects His Due While the Boys Sit by the Fire: Why Michigan Cannot Afford to Buy Into the Death Penalty*, 13 T.M. Cooley L. Rev. 877 (1996) (arguing that the death penalty costs too much and should not be adopted in Michigan).

152. Richard C. Dieter, *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty*, n.81 and accompanying text (epilogue), Death Penalty Information Center (1992, revised 1994), available at <http://www.deathpenaltyinfo.org/dpic.r08.html> [hereinafter Dieter, *Millions Misspent*].

153. *Id.*

154. Philip J. Cook & Donna B. Slawson, *The Costs of Processing Murder Cases in North Carolina*, 78 (May 1993), available at <http://www.pps.aas.duke.edu/people/faculty/cook/comnc.pdf> (last visited Mar. 3, 2003) [hereinafter Duke Study].

155. Brooks & Erickson, *supra* note 151, at 880; see also Dieter, *Millions Misspent*, *supra* note 152, at n.80 and accompanying text (identifying the importance of knowing that the bulk of capital punishment costs occur pre-sentencing).

156. See Brooks & Erickson, *supra* note 151, at 885-900 (examining the costs associated with the death penalty pre-appeal). Brooks and Erickson make a very important point regarding trial costs: Most trial costs would be avoided completely in non-death murder cases because many non-capital cases never reach trial. Most are instead settled by plea agreements. Thus, in many cases, not only is the cost of a bifurcated trial avoided but also the guilt phase trial costs are also avoided. *Id.* at 890-91.

157. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

158. See *supra* notes 74-75 and accompanying text (identifying trial safeguards including bifurcated trials and finding of statutory aggravators); see also *Gregg*, 428 U.S. at 188. "The Supreme Court has recognized that death is different In *Gardner v. Florida* the Court noted . . . 'It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.'" Brooks & Erickson, *supra* note 151, at 880-81 (citing 430 U.S. 349 (1977)).

penalty.¹⁵⁹ The Duke study found that the length of each stage of pre-trial and trial significantly increased in capital cases.¹⁶⁰ In fact, researchers found that a death penalty trial takes approximately four times as long as a non-death penalty trial.¹⁶¹

The high costs of capital cases are due to increased investigative work on both sides, extensive pre-trial motions, and complex trials.¹⁶² In death penalty trials much more than liberty is at stake; therefore, both sides are willing to pull out all the stops. The voir dire process, for example, is more intensive because jurors need to be death-qualified.¹⁶³ Potential jurors must answer questions about their feelings on the death penalty to ensure that they would be able to sentence the defendant to death if the evidence supported that determination.¹⁶⁴ Further, most states require two defense attorneys.¹⁶⁵ Finally, the penalty phase is often longer than the guilt phase as defense attorneys bring out mitigating circumstances in a last-ditch effort to save their client's life.¹⁶⁶ The prosecutors also work hard to convict in such high cost and high profile cases by bringing in victim impact statements and family testimony.¹⁶⁷ The hidden costs of death penalty trials are the opportunity costs to prosecutors' offices.¹⁶⁸ If four prosecutors are needed in a capital case compared to only two in a non-capital murder case, prosecutorial resources are depleted.¹⁶⁹

The fact that most of the costs are incurred at the trial level shows that the so-called "endless" appeals process is not the reason for the extra costs. Also, these death penalty costs must be paid up front by the taxpayer and are not spread out over time like the costs of life sentences.¹⁷⁰ As discussed below, the up-front payment of large and

159. *Id.* at 881. "The [Court's] message was that capital defendants must be granted additional due process rights and protections beyond those granted to defendants in non-capital cases." *Id.*

160. See Duke Study, *supra* note 154.

161. See *id.*

162. See Dieter, *Millions Misspent*, *supra* note 152, at nn.82-83 and accompanying text.

163. For an example of a death qualification statute, see N.Y. Crim. Proc. Law § 270.16 (Consol. 1996).

164. See *id.*

165. See Dieter, *Millions Misspent*, *supra* note 152, at nn.82-83 and accompanying text.

166. See, e.g., Ashley Paige Dugger, *Victim Impact Evidence in Capital Sentencing: A History of Incompatibility*, 23 Am. J. Crim. L. 375, 385-86 (1996) (identifying the leeway granted a defendant presenting mitigating evidence).

167. See generally, e.g., *id.* at 375 (arguing against the use of victim impact statements).

168. See Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing Before the Assembly and Senate of Nevada (Apr. 18, 2002) (statement of Richard C. Dieter), available at <http://www.deathpenaltyinfo.org/RDcostTestimony.html> (last visited Mar. 3, 2003) [hereinafter Statement of Richard Dieter].

169. See *id.*

170. See *id.*

surprising amounts of money for death penalty trials accounts for the dramatic economic shock such trials can create in a community.¹⁷¹

2. Costs of the Death Penalty in California Specifically

California has also fallen victim to the money pit of death penalty adjudication. A study by reporters from the *Sacramento Bee* estimated that in 1988, California spent \$90 million dollars per year on the death penalty beyond the ordinary costs of a murder trial.¹⁷² Of that \$90 million, \$78 million was incurred at the trial level.¹⁷³ A more recent study of Los Angeles County showed that the cost for each capital trial in Los Angeles was over three times the cost for a non-capital murder trial.¹⁷⁴ The Joint Legislative Budget Committee of California stated that abolition of the death penalty would save the state tens of millions of dollars each year.¹⁷⁵ That most costs are incurred at these earlier stages, pre-appeal, is significant because county prosecutors are not responsible for many post-sentencing costs such as incarceration.¹⁷⁶ Further, these early costs cause the severe and shocking economic impact on counties, discussed below in Part II.B.¹⁷⁷ It is because these costs are so severe and affect the county prosecuting budget directly that the correlation between charging decisions and county budgets is more likely to be causal rather than coincidental.

California state prosecutors were criticized for doggedly pursuing the death penalty in the case of Yosemite murderer Cary Stayner even though Stayner was already serving life without parole.¹⁷⁸ The mother of one of Stayner's victims convinced federal prosecutors not to pursue the death penalty precisely because of the costs involved. She stated: "It was a waste of money. There are so many things our country needs—I'm a teacher for crying out loud!"¹⁷⁹ The state prosecutors have assigned twelve people to Stayner's death penalty

171. See *infra* Part II.B.

172. Stephen Magagnini, *Closing Death Row Would Save State \$90 Million a Year*, *Sacramento Bee*, Mar. 28, 1988, at A1.

173. *Id.*

174. *The High Cost of the Death Penalty to Taxpayers*, at www.deathpenalty.org/facts/other/costly.shtml (last visited Mar. 3, 2003) (citing David Erickson's 1993 master's thesis from the University of California Berkeley Graduate School of Public Policy). Erickson's study did not incorporate any post-conviction costs.

175. See Death Penalty Information Center, *Costs of the Death Penalty*, at <http://www.deathpenaltyinfo.org/costs2.html> (citing *The Catalyst*, Feb. 22, 2000) (last visited Apr. 15, 2003).

176. See *infra* note 289 and accompanying text.

177. See *infra* Part II.B and note 209 (citing Kathleen Baicker's working paper regarding the economic impact of death penalty trials on small communities).

178. A.C. Thompson, *Is It Worth \$3 Million to Kill this Man?*, *S.F. Bay Guardian*, April 24, 2002, at 18.

179. *Id.*

case already.¹⁸⁰ It was estimated that Stayner's trial alone would cost \$3 million.¹⁸¹

Not only does California spend much more on death penalty trials than other states, these high-priced death sentences fall prey to the same problems of judicial error, attorney incompetence, and prosecutorial misconduct as the sentences obtained in bargain states. The *San Jose Mercury News* estimates that for every execution in California, seven death sentences are overturned on appeal.¹⁸² This ratio reflects not exoneration of guilt, but rather that most defendants were guilty but did not meet the requirements for a death sentence under the statute.¹⁸³ Further, it is not the California state courts that are overturning convictions, but rather the federal courts.¹⁸⁴ California's extremely conservative Supreme Court overturns only 10% of death sentences while the federal courts overturn 62% of those death sentences affirmed by the California Supreme Court.¹⁸⁵ The fact that the California Supreme Court seems to unjustifiably affirm convictions leading the defendant to resort to federal court relief has led to California having the most inmates on death row but only ten executions since the reinstatement of the death penalty in 1978.¹⁸⁶ In fact, two condemned inmates are still sitting on death row after being sentenced in 1978.¹⁸⁷ There are eight condemned men still on death row following 1979 convictions.¹⁸⁸

3. The Cost of the Death Penalty in New York

New York reinstated the death penalty in 1995 amid much political controversy. Since 1995, the state has spent an incredible amount of money to implement the death penalty.¹⁸⁹ This amount does not reflect a surge in first degree murders. Much of the cost came from creating the infrastructure for capital punishment: building and

180. *Id.*

181. *Id.*

182. Howard Mintz, *Death Sentence Reversals Cast Doubt on System: Courtroom Mistakes Put Executions on Hold*, *San Jose Mercury News*, Apr. 13, 2002, at A1.

183. *See id.*

184. James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995 State Report Card, California 1976-1995*, app. A (Jun. 12, 2000), available at <http://www.law.columbia.edu/instructionalservices/liebman/> (last visited Mar. 3, 2003).

185. Mintz, *supra* note 182.

186. Death Penalty Information Center, *Number of Executions by State Since 1976*, at <http://www.deathpenaltyinfo.org/dpicreg.html> (last visited Mar. 2, 2003). The California Department of Corrections puts the number of condemned inmates at six hundred twenty-two as of April 9, 2003; six hundred eight men and fourteen women. *See* California Department of Corrections, *Condemned Inmate List Summary* (2003), available at <http://www.cdc.state.ca.us/CommunicationsOffice/CapitalPunishment/PDF/2003-04Summary.pdf> (last visited Apr. 15, 2003).

187. *Id.*

188. *Id.*

189. *See infra* notes 191-95 and accompanying text.

guarding death row and the execution chamber, training a fleet of prosecutors to handle death penalty cases, and attempting to comply with complex Supreme Court death penalty jurisprudence.¹⁹⁰ The total cost of reinstating the death penalty could reach up to \$238 million before the first execution is carried out.¹⁹¹ To reinstate the death penalty, the state spent \$1.3 million dollars constructing death row, and pays \$300,000 annually to guard it.¹⁹² In addition, New York has increased training costs for prosecutors by of \$1.2 million annually and death penalty trials consume a significant portion of prosecutorial resources.¹⁹³ For example, the District Attorney's office in Queens County approximated that death penalty trials create 300% to 500% more work for the office than non-capital trials.¹⁹⁴

Much like other states, not only does New York spend an enormous amount on death penalty trials, but the amount spent fails to garner the government's desired result because the sentences do not comply with constitutional requirements. *People v. Harris*, the only New York death penalty case to be argued in front of the New York Court of Appeals since 1995, cost over \$3.6 million dollars total for both defense and prosecution.¹⁹⁵ Daniel Harris was convicted and sentenced to death for a multiple homicide at a social club in Brooklyn in 1998.¹⁹⁶ On appeal, the Brooklyn District Attorney's office enlisted outside help from eight other county prosecutor's offices.¹⁹⁷ In the summer of 2002, after many hours and dollars spent, Harris's death sentence was vacated and the New York Court of Appeals directed the trial court to resentence Harris to life without the possibility of parole.¹⁹⁸ Thus, not only has New York spent an inordinate amount of money to reinstate the death penalty after twenty-three years of absence, but because constitutional protections require strict review and super due process, it is money washed down the drain.

4. The Cost of the Death Penalty in Other Big Death Penalty States: Florida and Texas Briefly

Much like New York, Florida spends a similarly inflated amount of money on death penalty cases which are eventually overturned. It

190. *Id.*

191. Death Penalty Information Center, *supra* note 175 (citing N.Y. Daily News, Oct. 19, 1999).

192. *Id.* (citing N.Y. L. J., Apr. 30, 2002).

193. *Id.*

194. *Id.*

195. *See id.*; *see also* *People v. Harris*, 98 N.Y.2d 452 (2002).

196. *Harris*, 98 N.Y.2d at 473.

197. *See* Death Penalty Information Center, *supra* note 175 (citing N.Y. L. J., Apr. 30, 2002).

198. *See Harris*, 98 N.Y.2d at 497.

costs Florida \$51 million per year to carry out the death penalty.¹⁹⁹ Florida has executed forty-four people since 1976, therefore, each execution cost approximately \$23 million dollars more than it would have cost to sentence these defendants to life without parole.²⁰⁰

Texas has far fewer cases overturned on appeal than does Florida, but similarly spends an incredible amount on the death penalty. In Texas, death penalty trials cost three times more than the cost of housing an inmate in the highest security prison for forty years.²⁰¹ Texas leads the country in executions,²⁰² therefore, the legislature's goal is accomplished through the use of much of the state's overall budget.

B. The Effect of the Exorbitant Costs Associated with Death Sentences: Death Penalty Trials Are as Economically Shocking to Local Governments as Environmental Disasters

The *Wall Street Journal* ran an article recently identifying the much overlooked cost of the death penalty.²⁰³ The *Journal* study stated that such costs are unexpected and can cause as much local economic damage as a natural disaster.²⁰⁴ With natural disasters, however, the federal government is equipped to bail out the hard-hit counties.²⁰⁵ In death penalty trials, however, there is no federal bail out.²⁰⁶ Capital trials are not only expensive, they are unexpected.²⁰⁷ Most small counties cannot adequately prepare for the up-front costs presented by a death penalty charge as the trials are thankfully rare.²⁰⁸

Katherine Baicker similarly concludes that death penalty trials in small counties can result in economic shock, similar to that shock which occurs during natural disasters.²⁰⁹ Most counties with the death penalty did not sentence anyone to death from 1983 to 1997.²¹⁰ Because the counties that infrequently implement the death penalty

199. S.V. Date, *The High Price of Killing Killers*, Palm Beach Post, Jan. 4, 2000, at A1.

200. *Id.*

201. Christy Hoppe, *Executions Cost Texas Millions*, Dallas Morning News, Mar. 8, 1992, at 1A (stating Texas death penalty trials cost approximately \$2.3 million per trial).

202. See Death Penalty Information Center, *supra* note 186. Texas has executed 299 people since 1976. The state with the next highest number of executions is Virginia with 87 as of March 15, 2003.

203. Russell Gold, *Counties Struggle with Cost of Prosecuting Death-Penalty Cases*, Wall St. J., Jan. 9, 2002, at B1.

204. *Id.*

205. *Id.*

206. *Id.*

207. Baicker, *supra* note 28, at 3. Baicker is the author of a highly anticipated paper regarding the effect of capital trials on local economies. Her forthcoming paper has been cited by influential authorities in the field of death penalty research.

208. See *id.*

209. *Id.*; see also Gold, *supra* note 203.

210. Baicker, *supra* note 28, at 3.

are generally small and poor, the costs of capital trials in such localities are large in comparison to the county budget.²¹¹ These costs are unprecedented in terms of prior budgetary considerations.²¹² Baicker's study found that capital trial induced shock decreased county services and increased taxes.²¹³ Baicker found this shock value to result in a national average increase in county spending of 1.8% per capital trial.²¹⁴ Further, counties increased their revenues by 1.6% per capital trial.²¹⁵ Baicker contends that this data show that capital trials are mainly financed by increasing revenues.²¹⁶ The main way counties increase their revenues when faced with a capital trial is to cut police funds and increase taxes.²¹⁷ Baicker found these consequences to exist in both large and small counties.²¹⁸

Anecdotal information regarding the effect of death penalty trials on county economies suggests repercussions that are even more disastrous. In New Jersey, for example, the state spent \$16 million on the death penalty in 1991.²¹⁹ As a consequence, the state could no longer afford to pay 500 police officers and was forced to lay them off the same year.²²⁰ In Florida, where each execution costs the state approximately \$23 million,²²¹ 3000 prisoners were released early because of a budget crisis.²²² Texas spent \$183.2 million dollars on the death penalty over six years.²²³ Because of this expenditure on capital trials, Texas cannot afford to house their inmates for the full term of their sentence.²²⁴ Texas inmates only serve on average twenty percent of their full sentences, instead being released early, causing many cases of recidivism.²²⁵

California counties also fall prey to the same intense economic impact as evidenced in Florida, New Jersey, and Texas. Though California's state government provides partial compensation to counties for capital trials, counties have nevertheless had their share of hardships because of death penalty trials. In Sierra County, where officials were forced to slash police budgets to pay for capital trials,

211. *See id.*

212. *See id.*

213. *See id.* at 5-6.

214. *Id.* at 11.

215. *Id.*

216. *Id.* at 12.

217. *See id.* at 13, 15.

218. *Id.* at 15.

219. *See Dieter, Millions Misspent, supra* note 152, at nn.8-9 and accompanying text.

220. *See id.*

221. *See Date, supra* notes 199; text accompanying notes 199-201.

222. *See Dieter, Millions Misspent, supra* note 152, at n.10 and accompanying text.

223. *Id.*

224. *See id.*

225. *Id.* at nn.14-16 and accompanying text.

the District Attorney candidly explained the detrimental effect the death penalty has had on his county:

If we didn't have to pay \$500,000 a pop for Sacramento's murders, I'd have an investigator and the sheriff would have a couple of extra deputies and we could do some lasting good for Sierra County law enforcement. The sewage system at the courthouse is failing, a bridge collapsed, there's no county library, no county park, and we have volunteer fire and volunteer search and rescue.²²⁶

Statements such as this show that counties must set aside real social welfare considerations in order to pay for capital trials. Because capital trials are so expensive, counties cannot afford to pay for law enforcement. Instead of being able to prevent crime with a strong police force, counties can only afford to attempt to execute a few criminals.

The case of Charles Ng exemplifies the lengths to which California county budgets are stretched in order to secure a death penalty conviction. Ng was wanted for multiple murder in California but remained in Canadian custody for six years while prosecutors tried to extradite him.²²⁷ Canada resisted releasing Ng because of the possibility he might be put to death.²²⁸ Once Ng was finally extradited, Orange County's bankruptcy forced the county to ask the trial judge to move the death penalty trial of Charles Ng to another county.²²⁹ Ng's defense attorneys also supported a change of venue to "any other county in California that has the money to pay for an investigation to help in the accused's defense."²³⁰ Defense attorneys claimed that Ng was denied a speedy trial because of the bankruptcy.²³¹ The trial was ultimately moved to Calaveras County, but officials there also claimed the trial would cause bankruptcy.²³² The saga continued until the state government agreed to reimburse Calaveras county for trial costs.²³³ All told, the prosecution of Charles Ng cost Calaveras County \$3.2 million dollars before trial and \$3 million more was expected to be spent during the trial.²³⁴

In a last example of California's plight, an official in Imperial County went to jail after refusing to pay defense costs for fear of

226. Dieter, *Millions Misspent*, *supra* note 152, at n.23 and accompanying text (quoting District Attorney James Reichle).

227. *Id.* at n.99 and accompanying text.

228. *Id.*

229. *Delay of Murder Trial is Linked to Orange County Bankruptcy*, N.Y. Times, Jan. 22, 1995, at A23.

230. *Id.*

231. *Id.*

232. See Dieter, *Millions Misspent*, *supra* note 152, at n.99 and accompanying text.

233. See *id.*

234. Tom Philp, *Only Funds Going Fast in Ng Case*, Sacramento Bee, July 19, 1994, at A1.

bankrupting the county.²³⁵ The county took its opposition to paying defense costs all the way up to the California Supreme Court, costing the county \$500,000 in litigation fees.²³⁶ Ultimately, the defendant was acquitted of all charges at trial and the county was forced to pay all reasonable defense costs.²³⁷

Besides county bankruptcy and loss of police protection, additional consequences of death penalty costs are apparent in other states.²³⁸ In Louisiana, for example, court appointed defense attorneys have to wait a year or more before being paid.²³⁹ This failure to compensate defense attorneys creates a fear that "poor people get poor representation."²⁴⁰ Also, in a Washington county, public employee pay raises were delayed, public nursing positions remained unfilled, and computer updates were halted because of the anticipated costs of future death penalty trials.²⁴¹

Further, economic recession exacerbates these problems. Richard Dieter, writing during the recession of the early 1990s, persuasively expressed this same concern.²⁴² In the current tough economic times there is also a high risk of more cutbacks in public services such as law enforcement when counties are faced with the overwhelming costs of death penalty trials.

C. Data Indicate that the County-by-County Variation Between Prosecutorial Charging Decisions May Result from County Prosecutors with Larger Budgets Who Are More Likely To Pursue Death Penalty Charges than Prosecutors in Poorer Counties

Recently, several studies have noted that charging statistics vary widely based on geographical location. Some scholars have conjectured that the disparity is due to different prosecutorial charging standards. A January 2003 study of Maryland's death penalty is discussed below along with studies of Nebraska, New York, and a new analysis of two California counties. These studies indicate a large variation between counties regarding prosecutorial charging decisions in capital cases.

235. Dieter, *Millions Misspent*, *supra* note 152, at n.25 and accompanying text.

236. *Id.*

237. *Id.*; Corenevsky v. Superior Court of Imperial County, 682 P.2d 360 (Cal. 1984).

238. See generally Baicker, *supra* note 28, at 4-6 (discussing increased property taxes and delayed computer upgrades as consequences of the high costs of the death penalty).

239. Death Penalty Information Center, *supra* note 175 (citing The Advocate, Apr. 5, 1999).

240. *Id.*

241. See *id.* (citing Associated Press, Apr. 2, 1999).

242. See Dieter, *Millions Misspent*, *supra* note 152, at nn.7-18 and accompanying text.

1. The Maryland Study

In January 2003, state-funded researchers in Maryland released a study analyzing disparities based on race and geographical location.²⁴³ The Maryland study examined the geographical and racial disparity between death sentences in Maryland to determine at which stage the disparity arose.²⁴⁴ This was the fifth investigation into the issues of race and arbitrariness through geographical disparity authorized by the State of Maryland.²⁴⁵ The Paternoster Maryland study was the most comprehensive of the previous studies, examining 1,113 homicides; all of the death eligible homicides in Maryland since 1978.²⁴⁶ The study focused on “four critical decision points” in prosecutors’ charging decisions:²⁴⁷ prosecutors’ decision not to withdraw the death notice;²⁴⁸ prosecutors’ decision to pursue the death penalty through the sentencing phase; and finally, each jury’s decision to invoke the death penalty.²⁴⁹ The study controlled for such variables as statutory and non-statutory aggravators, evidence presented for mitigation and circumstances of the crime.²⁵⁰

In their study of geographical disparity, the researchers found that in Baltimore County a defendant was significantly more likely to have a death notice filed against him than in Anne Arundel, Baltimore City, or Montgomery Counties.²⁵¹ The researchers indicated that these disparities could not be explained by differing numbers or types of homicides in the counties.²⁵² Baltimore County was also more likely to have a death notice “stick,” meaning that the prosecutors were not likely to withdraw a death notice once it had been filed.²⁵³

243. See generally Raymond Paternoster & Robert Brame et al., *An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction* (2003) (Executive Summary), available at www.urhome.umd.edu/newsdesk/pdf/exec.pdf (last visited Mar. 3, 2003).

244. *Id.*

245. *Id.*

246. See *id.* at 4.

247. *Id.* at 5.

248. “Death notice” is a term describing when prosecutors must notify the court and opposing counsel that the prosecution is considering pursuing the death penalty. Some states have time limits by which the prosecutor must file a “death notice” in order to pursue the death penalty. In Maryland, the District Attorney must notify the defense within thirty days of trial. *Id.* at 6. In New York, prosecutors must file within 120 days of the arraignment following first degree murder indictment. N.Y. Crim. Proc. Law § 250.40 (McKinney 2002).

249. See Paternoster & Brame, et al., *supra* note 243, at 5.

250. *Id.* at 11-12.

251. *Id.* at 23-25.

252. *Id.* at 24.

253. *Id.* The same disparity did not exist for the state attorney’s office. *Id.* Between those cases where death had already been charged, the state attorney’s decisions to make the death penalty “stick” did not vary by county. *Id.* The state attorney has a separate budget and would not be subject to the same monetary influences of localized economic shock as county prosecutors.

Baltimore County juries were also significantly more likely to actually impose a death sentence.²⁵⁴ The authors stated that the jury sentences in Baltimore County were an effect, not of a vindictive constituency, but rather reflected the prosecutors' initial charging decisions and decision to make the death notice stick.²⁵⁵ The authors concluded that the geographic location of the crime plays a significant role in whether the defendant will be subject to the death penalty.²⁵⁶ Further, the authors stated that the disparate treatment due to locale goes uncorrected throughout the later phases of the criminal justice system.²⁵⁷ In the summation, the authors emphasized the importance of jurisdiction in determining which cases are deemed death eligible:

One of the most impressive findings from this research is the power that state's attorneys have and exercise in determining whether or not to process a death eligible homicide as a capital crime. The variation in the treatment of cases across the different legal jurisdictions was substantial and robust. In the Maryland death penalty system, the jurisdiction where the crime occurs and legal prosecution begins is clearly one of the most important factors, and cannot be ignored.²⁵⁸

Thus, the researchers found that the county in which a murder is committed significantly affects the likelihood that a prosecutor will pursue the death penalty against a defendant.²⁵⁹

2. Professor Baldus's Study of Nebraska

David Baldus, the author of the famous study that fueled the defendant's argument in *McCleskey v. Kemp*,²⁶⁰ recently released a study of capital cases in Nebraska.²⁶¹ Though Baldus found that in Nebraska the death penalty was generally limited to the most culpable defendants, he also discovered that the consistency of sentencing was due to judicial discretion and not prosecutorial charging decisions.²⁶² Baldus stated that death-eligible cases in urban counties in Nebraska were twice as likely to be pursued through the penalty phase as those in rural areas.²⁶³ The Baldus study, much like the Maryland study,

254. *Id.*

255. *Id.*

256. *Id.* at 25.

257. *Id.* at 26.

258. *Id.* at 31.

259. *Id.*

260. 481 U.S. 279 (1987). For more information about *McCleskey*, see *supra* text accompanying notes 103-15.

261. See David C. Baldus et al., *The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis: Executive Summary*, Nebraska Crime Commission (July 25, 2001), available at www.nol.org/home/crimecom/homicide/homicide.htm (last visited Mar. 3, 2003).

262. *Id.* at 17.

263. *Id.* at 18.

controlled for many variables including defendant culpability, finances, and prosecutorial experience.²⁶⁴ Unlike the Maryland study, however, Baldus found that judicial intervention later in the criminal justice process eventually corrected the disparities.²⁶⁵

Additionally, Baldus found that an “‘adverse disparate impact’ on racial minorities” resulted from this disparate geographical treatment.²⁶⁶ Baldus stated that minorities were at high risk for having the prosecutor pursue the death penalty.²⁶⁷ The racial disparity exists because minorities in Nebraska primarily reside in large urban areas and urban prosecutors are more likely to pursue the death penalty.²⁶⁸ In fact, almost ninety percent of minority defendants in death-eligible cases are prosecuted by urban prosecutors.²⁶⁹ As a result, minorities statewide face a higher risk of death penalty trials than do similarly situated white defendants.²⁷⁰ Due to later judicial intervention, however, Nebraska as a whole maintains a proportional distribution of death sentences between white and minority defendants in death-eligible cases.²⁷¹

3. The New York Capital Defender Office Statistical Report

In New York, the Capital Defender Office published a report that included a brief geographical overview of county-by-county distribution of cases where the prosecutor considered the death penalty.²⁷² The report is somewhat limited by a lack of analyzable data because the death penalty has been in effect in New York only since 1995.²⁷³ Therefore, the number of death-eligible cases as well as death-noticed cases are fortunately few relative to other states.²⁷⁴ Nonetheless, preliminary data show geographical disparity in prosecutorial charging decisions. Despite accounting for only 19% of

264. *Id.* at 6-7.

265. *Id.* at 19-20; *see also supra* note 257 and accompanying text.

266. *See* Baldus, *supra* note 261, at 18.

267. *See id.* at 18-19.

268. *Id.* at 19.

269. *Id.*

270. *Id.*

271. *Id.* at 19-20.

272. *See generally Capital Punishment in New York State: Statistics From Seven Years of Representation (1995-2002)*, Capital Defender Office 6-8 (2002), available at <http://www.nycdo.org/7th-yr-stats.pdf> (last visited Mar. 3, 2003) [hereinafter *Capital Punishment in New York State*]. The Capital Defender Office is a state agency that was statutorily constructed under the New York death penalty law when it came into effect in 1995. The Capital Defender Office's primary purpose is to provide indigent defense counsel to people who may be subject to the death penalty in New York. *See About CDO*, at <http://www.nycdo.org> (last visited Mar. 3, 2003).

273. *Capital Punishment in New York State*, *supra* note 272, at 1.

274. *See id.* at 3. Prosecutors have filed death notice in forty-four previous cases and at the time of the report, were considering thirty-eight cases for the death penalty. *Id.* Death-eligible cases have been more frequent, with prosecutors formally investigating 730 cases. *Id.*

homicides, counties in upstate New York are responsible for 61% of capital prosecutions.²⁷⁵ Capital sentences are also disproportionately distributed, with three of the seven men sentenced to death since 1995 convicted in Suffolk County.²⁷⁶ A study much like the Baldus and Maryland studies would be necessary to determine if the geographical disparity in New York State exists as a material factor in charging decisions when controlling for other variables.

4. California: Raw Data Gathered from Riverside and Ventura Counties Indicate a Correlation Between County Budgets and Death Penalty Sentences

The research presented in this part regarding California's geographical distribution of death sentences uncovered a possible explanation for the disparities evidenced by the studies above.²⁷⁷ This part presents an original examination of two California counties with similar homicide clearance rates²⁷⁸ but extremely different death penalty sentencing histories. This admittedly simple statistical analysis is still of academic interest because it demonstrates a correlation between prosecutorial budgets and death penalty sentences. Table 1 shows that Riverside County, which has a significantly higher budget for criminal prosecution and defense, was also the county with a significantly higher number of death sentences. The average homicide clearance rate in Ventura County was 61.83, while the average in Riverside County was 62.8. The two counties are also close geographically, though Riverside is much larger, located in southern California in the area surrounding Los Angeles.²⁷⁹ While Table 1 does not account for the variables controlled for in the Baldus and Maryland studies (such as aggravating factors) it does illustrate a correlation between the amount of money a prosecutor's office is able to spend on expensive capital cases and the number of death sentences received in each county.

275. *Id.* at 5.

276. *Id.* Since the CDO report, a seventh man has been sentenced to death in New York. John Taylor was convicted in Queens County in the Fall of 2002. Sarah Kershaw & Marc Santora, *Jury Sentences Wendy's Killer To Be Executed*, N.Y. Times, Nov. 27, 2002, at A1. Only six men currently reside on New York's death row, however, as Daniel Harris's death sentence was vacated and replaced with life without parole in July of 2002. See *supra* text accompanying note 198. Harris was convicted in Kings County. *People v. Harris*, 98 N.Y.2d 452 (2002).

277. For all of the following data in Part II.C.4, see Table 1: Riverside and Ventura Counties: A Side-by-Side Comparison of Budgets and Death Sentences, *infra* [hereinafter Table 1].

278. The California Crime Index Homicide Clearance Rate computes how many homicides were cleared off police dockets per 100,000 population.

279. California Co. Map, U.S. Census, at www.censusfinder.com/mapca.htm.

TABLE 1: RIVERSIDE AND VENTURA COUNTIES: A SIDE-BY-SIDE COMPARISON OF BUDGETS AND DEATH SENTENCES

Year	County	Number Sentenced to Death ²⁸¹	Budget ²⁸¹ (budget year begins 6/30)	Homicide Rate ²⁸² (California Crime Index, Cleared Crimes)
1995	Riverside County	2	Pro \$42,971 Def \$19,767 Total \$62,738	69.9
	Ventura County	1	Pro \$30,753 Def \$ 7,999 Total \$38,752	65.4
1996	Riverside County	5	Pro \$48,615 Def \$20,905 Total \$69,520	64.9
	Ventura County	0	Pro \$32,341 Def \$ 9,018 Total \$41,359	48.5
1997	Riverside County	4	Pro \$50,913 Def \$22,518 Total \$73,431	64.5
	Ventura County	0	Pro \$33,540 Def \$ 9,091 Total \$42,631	56.0
1998	Riverside County	5	Pro \$58,902 Def \$14,232 Total \$73,134	67.3
	Ventura County	2	Pro \$35,648 Def \$ 9,013 Total \$44,661	58.3
1999	Riverside County	8	Pro \$66,869 Def \$14,719 Total \$81,588	48.3
	Ventura County	1	Pro \$38,672 Def \$ 9,357 Total \$48,029	57.9
2000	Riverside County	2	Data not available	58.2
	Ventura County	0	Data not available	62.5
2001	Riverside County	3	Data not available	66.7
	Ventura County	1	Data not available	84.2
TOTAL	Riverside County	29	Pro \$268,270 Def \$92,141 Total \$360,411	Average 62.8
	Ventura County	5	Pro \$170,954 Def \$44,478 Total \$215,432	Average 61.83

280. See California Department of Justice, Criminal Justice Statistics Center, Homicide in California (1995-2001) (This is a yearly publication compiling and analyzing trends in homicide statistics in California). These death sentence statistics are available online for the years 1997-2001 at <http://caag.state.ca.us/cjsc/publications/homicide/pub.htm>. Statistics for earlier years were obtained by directly contacting the California Department of Justice.

281. See Profile 2001, Criminal Justice Statistics Center, California Department of Justice Publication, Table 10 (2001), available at http://justice.hdcdojnet.state.ca.us/cjsc_stats/prof01/index.htm (last visited Mar. 3, 2003).

282. See *id.* at Table 1. Clearance rate statistics were used rather than the homicide rate because it seems the death sentences for a given year would be more closely correlated with the number of murders solved per year.

The most immediately noteworthy statistic is that Riverside County, with a total budget of over \$360,000 for 1995-1999, has sentenced twenty-nine people to death from 1995-2001. By contrast, Ventura County, with a total budget of approximately \$215,000 for 1995-1999, has only sentenced five people to death from 1995-2001. Of the years for which budget information was available, Riverside consistently outspent Ventura County by at least a third and, at times, Riverside spent as much as double the amount Ventura spent.

In 1999, Riverside prosecutors enjoyed their largest budget ever while the county defense attorneys' budget held steady from a funding cut in 1997. The total budget surpassed Ventura County by almost half. In this year of prosecutorial wealth, Riverside condemned eight defendants to Ventura's one. This disparity does not appear to be due to increased violence as the 1999 year brought Riverside's lowest homicide clearance rate of only 48.3. Budget data were not available for 2000 or 2001. If the budget trend continues, however, Riverside prosecutors are by far more likely to obtain a death sentence than Ventura prosecutors despite their similar homicide clearance rates. One reason for this disparity may be the obviously greater and increasing funding of the Riverside prosecutors as opposed to the limited funding of Ventura prosecutors. A more in-depth study is needed to determine if this apparent correlation is only a fluke. However, the data gathered thus far suggest a very interesting correlation which may affect the constitutionality of California's death penalty and should be investigated further.

III. *FURMAN*'S ARBITRARY APPLICATION ANALYSIS SHOULD BE EXTENDED TO THE CHARGING AND PRE-TRIAL STAGE

*A law which in the overall view reaches that [unconstitutional] result in practice has no more sanctity than a law which in terms provides the same.*²⁸³

If the above data indicate a causal relationship between county budget allocations and prosecutorial charging decisions, then the death penalty is being arbitrarily applied. Supreme Court jurisprudence dictates that meaningful distinctions must be made between who receives the death penalty and who does not. If county budgets determine that decision, then meaningful distinctions are lacking. Meaningful distinctions cannot be made when the application of the death penalty depends on the budget allocation of the county in which the murder is committed. Part III.A.1 identifies the key points of influence in the relationship between death penalty costs and prosecutorial budgets. Part III.A.2 argues that, because of Supreme

283. *Furman v. Georgia*, 408 U.S. 238, 256 (1972) (per curiam).

Court death penalty jurisprudence and public policy considerations, charging decisions cannot be based on county budget considerations because doing so would constitute arbitrary application of law. Further, this part describes other abuses of discretion that can occur because of the prosecutor's broad grant of authority. Part III.B argues that if county budgetary factors are unconstitutionally influencing prosecutorial charging decisions, then the Supreme Court must deal with the situation either by abolishing the death penalty or by extending its arbitrary application analysis to pre-sentencing stages.

*A. Use of Budgetary Funding as a Factor in Charging Decisions
Would Constitute Arbitrary Application of the Death Penalty*

*Under these laws no standards govern the selection of the penalty.
People live or die, dependent on the whim of one man . . .*²⁸⁴

Prosecutors are allowed broad discretion in determining whether to charge a defendant with a capital crime. However, this broad discretion is premised on the belief that prosecutors make these decisions based on the strength of their case and the egregiousness of the crime. If prosecutors are, in fact, basing their determinations of whether to charge a capital crime on whether they have enough money in the coffer, then this charging decision constitutes arbitrary application of law and should not be shielded under the guise of prosecutorial discretion.

1. The Importance to Prosecutors of Costs Associated with the Death Penalty and the Effect the Costs Have on Local Budgets in Regard to Prosecutorial Charging Decisions in Death Penalty Cases

As described in Part II.A, the cost of maintaining a death penalty scheme is staggering.²⁸⁵ The cost to try a capital case in California has been estimated to be as much as six times more than a non-capital murder trial.²⁸⁶ It is important to note that many of the increased costs of death penalty cases are incurred pre-incarceration because it is not the incarceration costs that concern our county prosecutor.²⁸⁷ Incarceration costs are generally handled at the state level while prosecution costs are handled by counties.²⁸⁸ Prosecutorial budgets

284. *Id.* at 253 (Douglas, J., concurring).

285. See *supra* Part II.A (laying out the costs of the death penalty nationally and in California, New York, Florida, and Texas specifically).

286. E. Michael McCann, *Opposing Capital Punishment: A Prosecutor's Perspective*, 79 Marq. L. Rev. 649, 697 (1996).

287. See Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. Crim. L. & Criminology 717, 719-20 (1996) (stating that prosecutors do not concern themselves with incarceration costs because those costs do not come out of the prosecutor's budget).

288. *Id.*

are generally not affected by post-conviction costs.²⁸⁹

Many prosecutors readily acknowledge the effect costly death penalty trials have on their budget and constituency. Manhattan District Attorney Robert M. Morgenthau stated, before New York reinstituted the death penalty, that the death penalty would be a "major impediment to law enforcement, because of the cost, time spent and diversion of resources."²⁹⁰ Because such costs are apparent and can have lasting impact on all areas of the community, they necessarily influence a prosecutor's decision to seek death.²⁹¹ The lack of money and the lasting economic impact of a death penalty trial on the community can create a real disincentive to pursue a death penalty conviction while a surplus can make counties more likely to pursue the death penalty.²⁹²

In addition, these costs cannot be cut because they are mandated by the Constitution. The California Supreme Court said as much in *Corenevsky v. People*.²⁹³ In *Corenevsky*, the court ordered that ancillary defense fees be paid by the county despite claims that this would bankrupt the county.²⁹⁴ The court found that reasonably necessary defense funds were included in an indigent defendant's right to counsel.²⁹⁵ Further, the court stated that despite the strain its ruling would place on poorer counties, "relief cannot be attained through retreat from established rules designed to implement indigent defendants' constitutional right to effective assistance of counsel, nor through methods that intrude on the exclusive power of the judiciary to determine the due process rights of indigent defendants."²⁹⁶ The court refused to balance due process rights against monies available in individual counties. Instead, the court stated that any balancing would create an equal protection problem by "directly condition[ing] a defendant's right to ancillary services, and hence effectiveness of

289. See *id.* (arguing that prosecutors should be made accountable for the "split-funding" occurring because of state-funded prisons and county-funded prosecutions).

290. Brooks & Erickson, *supra* note 151, at 903.

291. See *id.* The aforementioned District Attorney of Sierra County in California was also aware of the effect of death penalty costs on his county, stating he would be able to hire more deputies and investigators if he did not have to worry about death penalty trial costs. See *supra* note 226 and accompanying text. This again shows that, like District Attorney Morgenthau, many prosecutors recognize the costs to the community as a whole as a result of the death penalty.

292. See Acker, *supra* note 28, at 178; see also Statement of Richard Dieter, *supra* note 168 (stating that the effect of the intense economic burden on counties created by death penalty trials can lead to rich counties seeking the death penalty more often than poorer counties).

293. 682 P.2d 360 (Cal. 1984); see also *supra* notes 235-38 and accompanying text (discussing the fallout and subsequent civil litigation ensuing after County officials defied the *Corenevsky* court's order that the county pay defense costs because officials claimed it would bankrupt the county).

294. *Corenevsky*, 682 P.2d. at 370-71.

295. *Id.* at 370.

296. *Id.* at 362.

counsel, on the fisc of the county in which he is being prosecuted.”²⁹⁷ Due process rights reign supreme when compared to county budgetary constraints and cannot be diminished county-by-county as that would interfere with a defendant’s right to equal protection under the laws. If defendants in different counties have the same right under the Equal Protection Clause to defense costs then defendants in different counties should be treated equally with regard to charging decisions in capital cases as well. The likelihood of receiving the death penalty should not depend on budget allocations.

2. County Budget Considerations Are Not Within the Purview of the Broad Power of Prosecutorial Discretion

a. *The Supreme Court’s Grant of Broad Prosecutorial Discretion Is Not Without Limitation: Prosecutors Cannot Take Budgets into Account in Death Penalty Charging Decisions*

Prosecutors are afforded a wide berth in charging decisions. In modern death penalty jurisprudence, this discretion was first established in *Gregg v. Georgia*. In *Gregg*, Justice White stated in his concurrence that prosecutors have been given much leeway in their charging decisions.²⁹⁸ Instead of assuming that broad prosecutorial discretion will lead to arbitrary decisions, White stated that the Court would presume that prosecutors exercise their powers permissibly.²⁹⁹ White defined permissible factors for prosecutorial consideration as “the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. [D]efendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong.”³⁰⁰ This presumption exists “[a]bsent facts to the contrary” evidencing abuse of discretion.³⁰¹

The Supreme Court further extended the reach of prosecutorial charging discretion in *McCleskey v. Kemp*,³⁰² the Court’s most famous ruling regarding such discretion and the death penalty. In *McCleskey*, the Court denied relief to defendant McCleskey in spite of a complex multiple regression analysis of death penalty sentences in Georgia strongly indicating racial bias.³⁰³ The Baldus study examined two

297. *Id.* at 367 n.13.

298. See *Gregg v. Georgia*, 428 U.S. 153, 225 (1976) (White, J., concurring).

299. *Id.*

300. *Id.*

301. *Id.*

302. 481 U.S. 279 (1987); see also *supra* Part I.B (discussing another aspect of the *McCleskey* decision and the facts of the case).

303. *McCleskey*, 481 U.S. at 279.

thousand Georgia murder cases from the 1970s.³⁰⁴ That analysis revealed that “prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims.”³⁰⁵ Thus, this sophisticated study demonstrated not only that black defendants were disproportionately more likely to be subject to the death penalty but also that prosecutors were far more likely to charge a capital crime when the victim was white.³⁰⁶ Despite assuming the validity of the study’s findings, the Court still held that this statistical analysis did not constitute the “stark” pattern necessary to prove intentional discrimination in violation of the Constitution.³⁰⁷

In *McCleskey*, the Court distinguished between prosecutorial discretion in venire-selection cases from discretion in charging decisions.³⁰⁸ In venire-selection, the Court was able to find discrimination based on less sophisticated and less conclusive statistics.³⁰⁹ Because charging decisions are ultimately safeguarded by a jury determination of guilt, however, the Court failed to accord the same weight to statistical data in the case at hand as was granted in venire-selection cases.³¹⁰ In ruling that *McCleskey* was barred from claiming that similarly situated defendants were spared the death penalty, the Court stated that a prosecutor’s use of discretion as an act of mercy would not be considered a constitutional violation.³¹¹

The problem with extending the Court’s reasoning in *McCleskey* to charging decisions based on county funding is that county funding-based decisions do not constitute prosecutorial acts of discretionary leniency. In *McCleskey*, the Court identified several relevant factors for a prosecutor to consider when deciding whether or not to pursue the death penalty.³¹² Never did the Court mention funding as a permissible factor.³¹³ The Court cited the American Bar Association

304. *Id.* at 286.

305. *Id.* at 287.

306. *See id.*

307. *Id.* at 291 n.7, 293-99.

308. *Id.* at 293-95.

309. *Id.* at 294 (citations omitted).

310. *Id.* at 294.

311. *Id.* at 306-07.

312. *Id.* at 307 n.28.

313. *Id.* According to the Court:

If sufficient evidence to link a suspect to a crime cannot be found, he will not be charged. The capability of the responsible law enforcement agency can vary widely. Also, the strength of the available evidence remains a variable throughout the criminal justice process and may influence a prosecutor’s decision to offer a plea bargain or to go to trial. Witness availability, credibility, and memory also influence the results of prosecutions.

Id.

("ABA") Standards for Criminal Justice in describing permissible factors affecting prosecutorial decisions.³¹⁴ These standards state that the prosecutor may take into account factors such as the strength of the evidence, the circumstances of the crime, and community interest in prosecuting.³¹⁵ However, the ABA standards do not mention budget allocation as a permissible factor in deciding what to charge.³¹⁶

Further, statistics showing that county budget disparities affect charging decisions are not irrelevant to an arbitrary application inquiry. The Court feared McCleskey's argument could be extended to disparities in "defendant's facial characteristics, or the physical attractiveness of the defendant or the victim."³¹⁷ Unlike these facetious factors, prosecutorial use of county budgetary factors results in the unconstitutionally capricious and arbitrary application of the death penalty barred in *Furman*. Facial characteristics and attractiveness are immutable characteristics, while county budgets are controllable, alterable, and ever-changing. If differences in counties' budgets determine charging decisions and the disparity is not just a consequence of the jury system, then current death penalty statutes provide no meaningful distinction between those who are subject to death and those spared. This arbitrary application is unacceptable under *Furman* and should not be analogized to facial characteristics or physical attractiveness.

The *McCleskey* Court based its analysis on the Equal Protection Clause and the jurisprudence which requires the defendant to prove a "stark" pattern of purposeful discrimination that directly affected the defendant's individual case.³¹⁸ It is odd that the Court chose to look primarily at the Equal Protection Clause, as most death penalty cases primarily involve the Eighth Amendment.³¹⁹ Death is different, and, therefore, capital defendants are entitled to super due process protections to guard against the arbitrary application forbidden by the Eighth Amendment. Arbitrary application analysis allows a less conclusive showing of discrimination than the "stark" pattern the *McCleskey* Court required in order to find an equal protection violation.³²⁰ The Eighth Amendment does not require a "stark"

314. *Id.* at 313 n.37.

315. See Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion—Knowing There Will Be Consequences for Crossing the Line*, 60 La. L. Rev. 371, 380-81 (2000).

316. *Id.*

317. *McCleskey*, 481 U.S. at 317.

318. *Id.* at 292 (citing *Whitus v. Georgia*, 385 U.S. 545, 550 (1967), and *Wayte v. United States*, 470 U.S. 598, 608 (1985)).

319. See, e.g., *supra* Part I (analyzing Supreme Court death penalty jurisprudence since the landmark case of *Furman v. Georgia* stated that arbitrary application of the death penalty violated the Eighth Amendment).

320. See *supra* Part I.B (discussing the *McCleskey* decision and the Court's requirement that claims of discrimination be evidenced by a stark pattern of racial disparity).

pattern of arbitrary application or absolute proof of discrimination, as made clear in Justice Brennan's moving dissent.³²¹ Instead, the Court has been concerned with the risk of arbitrary application of law under the Eighth Amendment, not necessarily proof of such, as is seemingly required under the Equal Protection Clause.³²²

Finally, the *McCleskey* Court stated that public policy reasons for wide prosecutorial discretion made the Court uncomfortable with restricting that discretion without a showing of actual discrimination in the defendant's particular case.³²³ However, the public policy reasons for wide prosecutorial discretion have recently come under heavy attack. Many scholars express trepidation regarding the unchecked autonomy that prosecutors maintain, especially in charging decisions.³²⁴ Prosecutorial autonomy has led to prosecutorial abuse of discretion including pursuing cases supported by inadequate evidence, pandering to politics, and using impermissible factors when making charging decisions (such as county budgets). Examples of these prosecutorial abuses are discussed below.

b. A Public Policy Justification for Broad Prosecutorial Discretion Is Suspect Because Unchecked Discretion Can Result in Flagrant Abuse

There are many ways in which the wide berth of prosecutorial discretion can be abused, some of which seem more benign than others. A county prosecutor abuses his discretion when he takes his budget into consideration when deciding whether to pursue the death penalty in a homicide case. While this kind of abuse at first blush seems benign, this Note has endeavored to expose its true unconstitutional effects on the criminal justice system. A more obviously insidious abuse of prosecutorial discretion is prosecutorial misconduct. An exemplar of prosecutorial misconduct is the Rolando Cruz case. There, prosecutors pursued the death penalty based on evidence that was shaky at best, causing Cruz to be sentenced to death twice for a murder he did not commit.³²⁵ Cruz was charged with the gruesome kidnapping, rape, and murder of a 10-year-old girl in Illinois.³²⁶ The evidence was primarily based on a highly suspect "vision statement" supposedly provided by Cruz in which he described a dream to police containing details of the murder that were not public knowledge.³²⁷ Prosecutors persisted in the case against Cruz in spite of a detailed and accurate confession by another man,

321. *McCleskey*, 481 U.S. at 322 (Brennan, J., dissenting).

322. *Id.* (Brennan, J., dissenting). The Court did briefly analyze *McCleskey*'s Eighth Amendment claim but dismissed it out of hand. See *supra* Part I.B.

323. *Id.* at 296-97.

324. See, e.g., Moore, *supra* note 315, at 374.

325. *Id.* at 371-73.

326. *Id.*

327. *Id.* at 372.

Brian Dugan, who state troopers believed actually committed the crime.³²⁸ The prosecution did not make the defense aware of Dugan's confession through any of Cruz's trials.³²⁹

At his third death penalty trial, the evidence against Cruz finally unraveled.³³⁰ DNA testing revealed that Dugan had committed the murder, not Cruz. The witnesses in the case and the officer who claimed that Cruz had provided a vision statement all recanted.³³¹ A special prosecutor was appointed, and three prosecutors and four sheriff's deputies were indicted for conspiracy to commit official misconduct.³³² Cruz's case was the first instance of a prosecutor being criminally charged for actions resulting in a death sentence.³³³

As aforementioned, criminal prosecutorial misconduct is not the only threat stemming from broad prosecutorial discretion. More subtle, and harder to control, problems result from this unchecked power. The independent prosecutor is thought to humanize the criminal justice system by iconifying community values.³³⁴ This idea of community values, however, is sometimes interpreted by prosecutors as a call to pander to politics and public opinion.³³⁵ Prosecutors may seek the death penalty because of political considerations and ambition.³³⁶ Unfortunately, these decisions are subject to neither review nor discovery.³³⁷ Thus, there is a strong need for accountability in prosecutorial charging decisions.³³⁸

328. *Id.*

329. *Id.*

330. *Id.* at 373.

331. *Id.*

332. *Id.*

333. *Id.*

334. See Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 Va. L. Rev. 939, 959-60 (1997).

335. See *id.* at 958. This would also go against the ABA Standards for Prosecutorial Function. See McCann, *supra* note 286, at 671-72. "In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions." *Id.* (citing the ABA Standards for Criminal Justice: Prosecution Function and Defense Function).

336. Moore, *supra* note 315, at 382; see McCann, *supra* note 286, at 668 (stating that external pressures may influence charging decisions but seeking the death penalty based on "political ambition or community pressure will be extremely difficult, if not impossible to prove").

337. See Moore, *supra* note 315, at 383; see also *People v. Keenan*, 758 P.2d 1081, 1099 (Cal. 1988) (finding that prosecutorial discretion is broad and death penalty charging criteria are not subject to discovery absent a showing of invidious discrimination or caprice). This begs the question, how is such a showing of discrimination possible if the charging criteria are kept under lock and key?

338. See Richman, *supra* note 334, at 963.

c. Because Neither Supreme Court Jurisprudence nor Public Policy Would Allow Prosecutors To Consider Budgets in Death Penalty Charging Decisions, the Court's Arbitrary Application Analysis Should Be Applied Presentencing

Some prosecutorial discretion is necessary but not as much as the Court has allowed. Individualized prosecutorial discretion is necessary to mitigate over-criminalization by the legislature and to individualize justice generally.³³⁹ Nevertheless, prosecutorial discretion should not include charging decisions based on budget allocations because this is an arbitrary application of the law. In fact, even those arguing for broad prosecutorial discretion state that proposed restrictions are unacceptable because they may make prosecutors more likely to make decisions based on money.³⁴⁰ If it is unacceptable to curb prosecutorial discretion with civil penalties because prosecutors should not think of budgets in charging decisions, then it is no more acceptable for prosecutors to determine who should get the death penalty based on budget allocation.

Like the death penalty statute in *Ring v. Arizona*,³⁴¹ prosecutorial charging determinations for death eligible defendants based on county budgetary allocation poses a threat to the Constitution and the Supreme Court's death penalty jurisprudence. Recall that in *Ring*, the Court struck down the Arizona death penalty statute because it required that the trial judge, not the jury, determine whether facts existed making the defendant death-eligible.³⁴² It is no more constitutionally permissible that a county prosecutor arbitrarily determine a defendant's death eligibility. Unlike many factors that a prosecutor is allowed to take into account when pursuing death, budget is not a permissible factor. Budget considerations do not create a meaningful distinction between those cases in which the death penalty is imposed and those in which it is not.

Gregg, however, stated that the arbitrary inquiry analysis pertained only to the sentencing stage.³⁴³ In *Gregg*, Justice White's concurrence emphasized that the inquiry would not be extended to charging decisions absent "facts to the contrary" showing a prosecutor was making arbitrary charging decisions.³⁴⁴ Those facts are present and

339. See Moore, *supra* note 315, at 376.

340. See *id.* at 402 (citing Stuart Taylor, Jr., *It's Payback Time*, Tex. Law., Nov. 10, 1997, at 23).

341. See *supra* notes 129-45 and accompanying text.

342. See *supra* text accompanying notes 129-48.

343. See *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). "*Furman* mandates that where discretion is afforded a *sentencing body* on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly *arbitrary* and capricious action." *Id.* (emphases added).

344. *Id.* at 225 (White, J., concurring).

are evidenced by Judge Simmons' ruling in the Gregory McKnight case in August 2002,³⁴⁵ as well as county budget and death sentence statistics.³⁴⁶ A more in-depth study of this apparent correlation between county budgets and the number of death sentences sought is needed. If such a study were to find this correlation between prosecutorial charging and county budgets to be causative, Supreme Court jurisprudence should require that states rectify the county-by-county arbitrary application of their death penalty statutes. The *Furman* rule should be extended to charging decisions, for, in the eloquent words of Justice Frankfurter, "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late."³⁴⁷ Because the Court has never felt it necessary to extend its arbitrary application analysis to prosecutorial charging decisions does not mean that the Court should refuse to do so when faced with such compelling justification.

Both *Furman* and its progeny under *Gregg* speak of arbitrary application of the death penalty in reference to sentencing schemes. States have complied with the template of *Furman* but because the Court has refused to examine any instance of arbitrary application pre-sentencing, the states' post-*Furman* statutes are inadequate to combat arbitrary application. Arbitrary distinctions between which defendants get life and which are eligible for death still exist though the arbitrariness has shifted from uninhibited jury discretion during the sentencing stage to uninhibited pre-trial prosecutorial discretion. Normally, great deference is given to prosecutors' charging decisions. That deference, however, is based on a belief that prosecutors are making their decisions on the strength of their case, the community morals, and circumstances of the crime. No deference should be granted to a prosecutor who makes the decision whether or not to pursue a death penalty based on budget allowance. County budget considerations are arbitrary factors which should not come into play in charging decisions.

In *Gregg*, the Court refused to entertain the idea that impermissible factors influence prosecutorial charging decisions without supporting evidence.³⁴⁸ The discussion above shows that impermissible factors

345. See *supra* Introduction (discussing Judge Simmons' controversial ruling that a Vinton County, Ohio prosecutor could not pursue the death penalty against Gregory McKnight because the county lacked adequate funds).

346. See *supra* Part II.C (detailing several studies showing a correlation between geography and death sentences including a new study of two California counties showing a correlation between death sentences and county criminal justice budget allocations).

347. *Ring v. Arizona*, 122 S. Ct. 2428, 2446 (2002) (Breyer, J., concurring) (quoting *Henslee v. Union Planters Nat'l Bank & Trust*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting)).

348. *Gregg v. Georgia*, 428 U.S. 153, 225 (1976) (White, J., concurring). "Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood

do, in fact, influence modern prosecutorial discretion. The discretion is abused because prosecutors are taking into account more than just the strength of the case. Charging decisions are now dependent on the arbitrary factor of county budgetary allocations.

B. Possible Solutions to the Problem of Arbitrary Application of the Death Penalty Because of Differences in County Budget Allocations

1. Because Prosecutorial Consideration of County Budgets Results in Arbitrary Application of the Death Penalty, the Death Penalty Must Be Abolished

The death penalty cannot be arbitrarily applied. Death is different, and if the death penalty cannot be constitutionally instituted then it must be abolished. We need not fear that acknowledging the constitutional implications of the theory that prosecutorial decisions to pursue the death penalty are made in part based on county budget funding strikes "at the heart of the . . . criminal justice system," as feared by the *McCleskey* Court.³⁴⁹ Death is different, and should be treated as such. The Constitution does not require that every crime be treated with the same judicial scrutiny. The finality of death and the penalty's propensity for unequal application has been duly recognized by the Court.³⁵⁰ For this reason, the Court has imposed super due process safeguards.³⁵¹ These safeguards not only seek to combat arbitrary application in fact, but also seek to avoid the risk of arbitrary application.³⁵² Because the death penalty is the ultimate punishment and is very controversial, the Court has recognized that even the appearance of arbitrary application is unacceptable.³⁵³

Thus, if capital charges truly do depend on the budgetary situation of the county in which the crime is committed, this is an arbitrary application of law and must be rectified. Moreover, even if there is only a risk of such problems, the Court has recognized that it is important that the death penalty seem legitimate in the eyes of the people because it is the ultimate punishment a state can impose against its citizens. That Riverside County is able to sentence a disproportionately greater number of people to death than the similarly situated but poorer county of Ventura does not create a perception of legitimacy. When the state takes on the task of ending citizens' lives, it must do so with the utmost propriety. The principle

that a jury would impose the death penalty if it convicts." *Id.*

349. See *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987).

350. See *supra* Part I.

351. See generally *Furman v. Georgia*, 408 U.S. 238 (1972).

352. See *supra* note 321 and accompanying text (discussing Justice Brennan's dissent in *McCleskey*).

353. *Id.*

that the death penalty cannot be arbitrarily applied via budget-based prosecutorial charging decisions is not an attack on criminal justice as a whole, but rather is in line with Supreme Court jurisprudence that death should be treated differently.

Even if accepting this theory of unconstitutionally arbitrary use of prosecutorial discretion does implicate the heart of the criminal justice system, that is no reason to ignore the Eighth Amendment. To date, 103 people have been exonerated while waiting for execution on death row.³⁵⁴ Incalculable innocent people reside on death row still. Their precise numbers are incalculable because so many remain without representation and thus have no opportunity for exoneration. While they are assured of no execution until they receive representation on at least one appeal, they wait on death row until a willing lawyer can be found. Further, only 3% of counties with death penalty statutes account for 50% of the death sentences.³⁵⁵ This huge disparity seems to indicate arbitrary application.

The social climate is also turning away from the death penalty because of these inherent defects. Former Illinois Republican Governor, George Ryan, declared a moratorium on the death penalty in 2000, calling for an in-depth study of the death penalty.³⁵⁶ In 2003, Ryan, in a bold and controversial move, cleared Illinois death row of its 156 inmates, commuting most of their sentences to life without the possibility of parole and granting clemency to four men.³⁵⁷ Further, the Supreme Court recently declared it unconstitutional to execute someone who is mentally retarded.³⁵⁸ Many have come to believe that because of the inherent defects in capital punishment, the death penalty is a failed experiment.³⁵⁹ Abandoning this failed experiment completely would certainly solve the problem of arbitrary application of the death penalty.

354. Official Website of the Death Penalty Project, at <http://www.deathpenalty.org> (last visited Mar. 5, 2003).

355. *Ring v. Arizona*, 122 S. Ct. 2428, 2448 (2002) (citing Liebman et al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It*, app. B, Table 11A (Feb. 11, 2002)).

356. See generally Report of the Governor's Commission on Capital Punishment, George H. Ryan, Governor of Illinois (Apr. 15, 2002), available at http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_01.pdf (last visited Mar. 5, 2003).

357. Official Website of the Death Penalty Project, at <http://www.deathpenalty.org> (last visited Mar. 3, 2003).

358. *Atkins v. Virginia*, 122 S. Ct. 2242 (2002).

359. See generally Dieter, *Millions Misspent*, *supra* note 152; see also *supra* notes 356-58 and accompanying text.

2. In the Alternative to Abolition, Unconstitutionally Arbitrary Application of the Death Penalty Cannot Be Ignored

The problem of arbitrary application of the death penalty cannot go unattended. Even if the death penalty, with its seemingly never-ending parade of constitutional problems, is retained, it cannot continue to be arbitrarily applied. The probability of a sentence of death cannot vary from county to county based on budgets. Nor can budgets be cut to account for this problem. Already, defense attorneys make very little in death penalty cases and the profession is so underpaid that few lawyers are willing to make the sacrifice.³⁶⁰ Further, as seen in the California court system, county budgetary woes cannot subvert constitutional protections such as the right to counsel.³⁶¹ As discussed in Part II, the counties are already cash-strapped, and the country is in a recession.³⁶² These problems will hinder any attempt by counties to achieve non-arbitrary application of the death penalty.

Few solutions have been proposed to limit arbitrary application of the death penalty in reference to prosecutorial charging decisions because, as stated before, legal scholars are just beginning to examine the Court's arbitrary application analysis in reference to charging decisions.³⁶³ However, one proposed solution is mandatory proportionality review including all capital crimes where the death penalty was not sought.³⁶⁴ Another scholar proposed monetary compensation to unjustifiably prosecuted defendants.³⁶⁵ Certainly, greater discovery access in the area of prosecutorial charging decisions would also provide a clearer picture of what, as of now, is a murky and inaccessible swamp of prosecutorial power.³⁶⁶

Opponents may argue that this Note condemns the entire criminal justice system and thus, that arbitrary application based on county budgets should be accepted as a fundamental flaw in the system. However, when dealing with the ultimate punishment we cannot merely accept fundamental constitutional flaws. Arbitrary application

360. See generally Symposium, *Indigent Criminal Defense in Texas*, 42 S. Tex. L. Rev. 979, 1088 (2001) (discussing the appalling lack of funds for Texas criminal defense attorneys in the state with the highest number of executions per year).

361. See generally *Corenevsky v. People*, 682 P.2d 360 (Cal. 1984).

362. See *supra* Part II (discussing the economic effects on counties when faced with expensive and unexpected death penalty trials).

363. See *supra* text accompanying notes 28-29.

364. See, Moore, *supra* note 315, at 400 (arguing for direct judicial oversight of prosecutors).

365. See *id.* at 401 (arguing further for fines for prosecutorial misconduct).

366. See generally Misner, *supra* note 287 and accompanying text (proposing a system to make prosecutors more accountable to the electorate and end the "split funding" between trial costs paid by counties and incarceration costs paid by the state); Richman, *supra* note 334 and accompanying text (arguing for prosecutorial accountability and openness achieved through the courts).

via budget-based prosecutorial charging decisions is an imperfection we cannot live with when dealing with the death penalty. Balancing interests can be justified in other criminal arenas, but as the Supreme Court itself has stated, death is different. States that apply the death penalty arbitrarily are in violation of the Constitution. The death penalty cannot be “so wantonly and so freakishly imposed” as it is when county budgets determine prosecutorial charging decisions.³⁶⁷

367. *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).